No. 84-978

IN THE

Supreme Court of the United States

OCTOBER 1984 TERM,

EXXON CORPORATION, THE BFGOODRICH COMPANY, UNION CARBIDE CORPORATION, MONSANTO COMPANY AND TENNECO CHEMICALS, INC.,

Appellants,

vs.

ROBERT HUNT, Administrator of New Jersey Spill Compensation Fund; CLIFFORD A. GOLDMAN, Treasurer of the State of New Jersey; SIDNEY GLASER, Director of the Division of Taxation, JERRY F. ENGLISH, Commissioner of Environmental Protection, and THE STATE OF NEW JERSEY,

Appellees.

Appeal from the Supreme Court of New Jersey

JURISDICTIONAL STATEMENT—STATE CIVIL CASE

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PRELIMINARY MATTER

QUESTIONS PRESENTED

1. Whether the taxing provisions of the New Jersey Spill Compensation and Control Act, N.J.S. 58:10-23.11 *et seq.* are preempted by The Comprehensive Environmental Response Compensation and Liability Act of 1980 (Superfund), 42 U.S.C. § 9601 *et seq.* and, therefore, the imposition of them is in violation of the Supremacy Clause of the United States Constitution?

2. Whether the Supreme Court of New Jersey disregarded the plain and recent mandate of this Court in *Aloha Airlines v. Director of Taxation of Hawaii,* 104 S. Ct. 291 (1983), when it nullified an explicit preemption provision of Superfund by formulating a contrary Congressional purpose from legislative history? *

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* The names of all of the parties to this proceeding in the Court below are included in the caption of these pleadings. The listing of parent companies, subsidiaries (except wholly owned) and affiliates are set forth in the Appendix attached hereto at page 1a.

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JURISDICTIONAL STATEMENT

Opinion Below

The opinion of the New Jersey Tax Court entered on April 23, 1982, the opinion of the Superior Court of New Jersey, Appellate Division, entered on June 22, 1983, and the opinion of the Supreme Court of New Jersey, entered on September 19, 1984, are set out in the Appendix hereto. The decision of the Tax Court is reported at 4 N.J. Tax 294 (Tax Ct. 1982); the decision of the Superior Court, Appellate Division is reported at 190 N.J. Super. 131 (App. Div. 1983). The decision of the New Jersey Supreme Court is reported at 97 N.J. 526 (1984).

Jurisdiction in this Court

This suit challenges the constitutionality of the taxing provisions of the New Jersey Spill Compensation and Control Act, N.J.S. 58:10-23.11 *et seq.* on the basis that such provisions are expressly preempted by § 114(c) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9601 *et seq.* (Superfund), and, therefore, in violation of the Supremacy Clause of the United States Constitution.

The federal constitutional question involved in this suit has continuously been raised by appellants in all proceedings. The New Jersey Tax Court entered a decision upholding the constitutionality of the New Jersey Act on the basis that § 114(c) of Superfund did not preempt the New Jersey Tax. This decision was affirmed by the New Jersey Appellate Division and New Jersey Supreme Court.

Notice of appeal to this Court was timely filed on November 19, 1984.

The jurisdiction of the United States Supreme Court to review the decision of the Supreme Court of New Jersey on appeal is conferred by 28 U.S.C. § 1257(2). *Aloha Airlines, Inc. v. Director of Taxation of Hawaii,* 104 S. Ct. 291, 294 (1983); and *Arizona Public Service Co. v. Snead,* 441 U.S. 141, 146 (1979) support the jurisdiction of the Supreme Court to review the judgment on appeal in this case.

Constitutional and Statutory Provisions Involved

The Supremacy Clause of the United States Constitution, Article VI, C1. 2, provides as follows:

> This Constitution and the Laws of the United Stat es which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Comprehensive Environmental Response Compensation and Liability Act of 1980, 42 U.S.C. §9601, *et seq.*, is set out in full in the Appendix hereto. Section 114(c) of Superfund, 42 U.S.C. §9614(c) provides as follows:

> Except as provided in this chapter, no person may be required to contribute to any fund, the purpose of which is to pay compensation for claims for any costs of response or damages or claims which may be compensated under this subchapter. Nothing in this section shall preclude any State from using general revenues for such a fund, or from imposing a tax or fee upon any person or upon any substance in order to finance the purchase or prepositioning of hazardous substance response equipment or other preparation for the response to a release of hazardous substances which affects such State.

The New Jersey Spill Compensation and Control Act, N.J.S. 58:10-23.11, *et seq.*, is set out in pertinent part in the Appendix hereto.

Statement of the Case

On December 11, 1980, in response to an increasing awareness of the damages caused by the release of hazardous substances into the environment, Congress enacted "Superfund," 42 U.S.C. §9601 *et seq.* The national response effort was to be addressed by the federal government in cooperation with the states. It was to be financed on the federal level by a $1.6 billion trust fund, eighty-seven and one-half percent of which was to be raised by a feedstock tax imposed on crude oil and petroleum products and on certain chemicals. It was understood at the time that while a feedstock tax was not the most equitable assessment available to fund hazardous waste identification and clean-up, it was the easiest to administer since it involved collection from only approximately 1,000 taxpayers instead of an estimated 260,000 if the fund were financed by a tax placed on generators of hazardous waste. S. Rep. No. 848, 96th Cong., 2d. Sess. 20 (1980).

Under Superfund's financing scheme, the States were required to pay only a 10% matching share of clean-up costs for

remedial action (unless they were responsible for the waste site). In return for the flow of funds collected under the federal taxing scheme to the States, the States were expressly precluded by §114(c) of Superfund, 42 U.S.C. §9614(c), from taxing any person to cover claims, costs or damages which "may be compensated" under the federal Act. Section 114(c) goes on to state, however, that "[n]othing in this section shall preclude any State from using general revenues for such a fund, or from imposing a tax or fee upon any person or upon any substance in order to finance the purchase or prepositioning of hazardous substance response equipment or other preparation for the response to a release of hazardous substances which affects such State."

Since the mid-1970's, the State of New Jersey has had in effect a Spill Compensation and Control Act. N.J.S. 58:10-23.11 *et seq.* (New Jersey Act). The New Jersey Act prohibits the discharge of petroleum and other hazardous substances in the State of New Jersey and, in addition, provides for the clean-up and removal of such discharges, the establishment of a Spill Compensation Fund, and the raising of revenue therefor by the levy upon each and every operator of a major facility in New Jersey of a barrel tax involving chemical and petroleum products.

From the inception of the New Jersey Fund until June, 1981, 93% of the revenues collected totaling $31,000,000 was spent on claims relating to clean-up and containment of hazardous substances other than petroleum. Clean-up of petroleum-related sites constituted less than 1% of expenditures.

Since the enactment of Superfund, clean-up of petroleum-related spills has continued to constitute less than 1% of the expenditures from the New Jersey fund. Expenditures for equipment have constituted less than 2% of the fund. Expenditures by the State on just two sites which are listed on the Superfund National Priority List total $12,000,000 out of $18,000,000 expended. This information is contained in discovery material furnished by New Jersey.

Thus, the statutory provisions at issue in this case require operators of major facilities, including plaintiffs, to contribute to a fund, the principal purpose of which is to pay compensation of

claims for the costs of response or damages or claims which "may be compensated" under the federal law.

As early as 1976, the New Jersey legislature anticipated that the New Jersey Act would have to be incorporated into a federal scheme of hazardous substance clean-up and containment once a national plan was formulated. The legislature, therefore, included the following provision in the New Jersey Act:

> If the United States Congress enacts legislation providing compensation for the discharge of petroleum and hazardous products, the Commissioner shall determine to what degree that legislation provides the needed protection for our citizens, businesses and environment and shall make the appropriate recommendation to the legislature for amendments to this act. N.J.S. 58:10-23.11z.

To date, New Jersey has not complied with this directive. If it chose, New Jersey could have amended the Spill Fund to cover only non-preempted items and adjusted the tax rate accordingly.

A complaint in this suit was initially filed by plaintiffs in the United States District Court, which dismissed plaintiffs' suit based on the Tax Injunction Act, 28 U.S.C. §1341. The Third Circuit Court of Appeals affirmed the jurisdictional decision of the District Court on the basis that plaintiffs' claim did not "arise under" federal law and the United States Supreme Court denied plaintiffs' Petition for Certiorari. *Exxon Corp. v. Hunt*, 683 F.2d69 (3d Cir. 1982), *cert. denied*, 439 U.S. 1104 (1983).

On August 10, 1981, plaintiffs filed a complaint in the Tax Court of New Jersey. On cross motions for summary judgment, the Tax Court, on April 23, 1982, granted the State defendants' motion and dismissed all but two counts of plaintiffs' complaint. The remaining two counts, which do not involve any question of the constitutionality of the State statute, were severed from the rest of the case for purposes of appeal and the decision of the Tax Court was appealed to the Appellate Division on May 7, 1982. This appeal was consolidated with an appeal by the plaintiffs of the regulations of the New Jersey Department of Treasury governing expenditures under the New Jersey Act. On

June 22, 1983, the Appellate Division rendered an opinion affirming the judgment of the Tax Court below with regard to the taxing provisions of the New Jersey Act, but invalidating the Treasury Department regulations on procedural grounds. Plaintiffs filed a Petition for Certification with the New Jersey Supreme Court on July 2, 1983. On September 19, 1984, the Supreme Court of New Jersey affirmed the judgment of the Tax and Appellate Courts.

The conclusion of the Courts below was that "[t]he Spill Fund tax imposed on plaintiffs is not preempted by section 114(c) of Superfund insofar as Spill Fund is used to compensate hazardous waste cleanup costs and related claims that are either not covered or not actually paid under Superfund. The underlying intent of Superfund, as well as the legislative history, mandates a conclusion of *no preemption.*" *Exxon Corp. v. Hunt,* 97 N.J. 526, 544 (1984). (emphasis added) The crux of these opinions is an interpretation of the pivotal language "may be compensated" in §114(c) of Superfund, which the Courts below concluded should be read as "has been compensated." This rewriting substitutes the concept of actual compensation for that of compensability. It is justified by the Courts as required to effectuate the true legislative intent behind §114(c) and thereby avoid New Jersey's dire predictions and speculations as to shortfalls in Superfund's coverage.

During the pendency of these lawsuits, plaintiffs have continued to pay into the New Jersey Spill Fund in accordance with its terms. From January, 1981 through June, 1982, plaintiffs paid approximately $5,759,000 into the New Jersey Fund. The total of payments to date is in excess of $9,000,000. Refund claims have been filed by the plaintiffs, but they have been denied by New Jersey unless a court ruling invalidating the Spill Fund Tax is obtained.

Substantiality of the Questions Presented

This appeal presents a substantial question of national public importance, involving the application of the Supremacy

Clause of the United States Constitution to a direct conflict between federal and state law.

The instant case has, as its context, one of the most significant environmental issues today, the identification and clean-up of hazardous waste. The specific issue on appeal involves the critical question of the funding sources of such identification and clean-up. Plaintiffs allege that the taxing provisions of the New Jersey Spill Compensation and Control Act violate the express taxing proscriptions of §114(c) of Superfund, thereby thwarting the objectives of Congress in enacting the federal statute.

This court has long recognized the principle that where a state statute is in violation of a federal statute which has preempted the field or stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, the Supremacy Clause of the United States Constitution, Article VI, clause 2, mandates that the State statute must fall. *Aloha Airlines, Inc. v. Director of Taxation of Hawaii,* 104 S. Ct. 291, 294 (1983); *Maryland v. Louisiana,* 451 U.S. 725, 746-47 (1981); *Arizona Public Service Co. v. Snead,* 441 U.S. 141, 146 (1979). Preemption in a field has been compelled by the Supreme Court "whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purposes." *Jones v. Rath Packing Co.,* 430 U.S. 519, 525 (1977). Even if Congress has not foreclosed the field, state statutes have consistently been held to be void to the extent of actual conflict with federal statutes. *Ray v. Atlantic Richfield Co.,* 435 U.S. 151, 158 (1978).

In the present case, all that is required to determine that preemption exists is to compare the federal and state statutes. Doing so, it is obvious that the New Jersey Spill Tax, as now constituted, directly conflicts with the express terms of §114(c) of Superfund, since it requires the plaintiff taxpayers to contribute to a fund, the essential and principal purpose of which is, indisputably, to pay compensation for claims and costs which may be compensated under Superfund. It follows, therefore, that preemption doctrine as enunicated by this Court mandates that the State statute must fall.

This conclusion is not avoided by citation to case law which directs a narrow construction of preemption language wherever possible. When a federal statute expressly preempts State regulation and then authorizes narrow exceptions from such preemption, attempts at State regulation must fall within these authorized exceptions. *Exxon Corp. v. City of New York*, 548 F.2d 1088, 1094 n.10 (2d Cir. 1977); *Donelon v. New Orleans Terminal Co.*, 474 F.2d 1108, 1112 (5th Cir.), *cert. denied*, 414 U.S. 855 (1973). In this instance, New Jersey is restricted to taxing Superfund taxpayers only for those authorized exemptions to preemption set forth in the second sentence of §114(c).

Instead of following the long-standing preemption doctrine developed by this Court, recently set forth in *Aloha Airlines*, the New Jersey courts below have ignored legal mandates and decided this case on policy grounds, narrowing the scope of preemption under §114(c) of Superfund into literal nonexistence. In so doing, the State courts violated several established principles of statutory construction.

A fundamental rule of statutory construction looks to the language of the statute itself, and requires that if the statutory language is plain, unambiguous and uncontrolled by other parts of the act or other acts upon the same subject, there is no leeway for judicial interpretation as to legislative intent. In such instance, the court need only interpret the statute according to its terms. *Aloha Airlines, Inc. v. Director of Taxation of Hawaii*, 104 S. Ct. 291, 294 (1983); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976); *Caminetti v. United States*, 242 U.S. 470, 485 (1917); *Matala v. Consolidation Coal Co.*, 647 F.2d 427, 429-30 (4th Cir. 1971).

In § 114(c) of Superfund, Congress has expressly preempted States from imposing special taxes on a limited class of persons for the purpose of covering any "claims which may be compensated under" Superfund and has limited States to "using general revenues for such a fund" or to "imposing a tax or fee . . . to finance the purchase or prepositioning of hazardous substance response equipment" and the like. The New Jersey Supreme Court, pursuing the principle that "there is no surer

way to misread any document [including a statute] than to read it literally," thus "direct[ed] [its] attention to the meaning of § 114(c) in the context of the supportive provisions of Superfund and the legislative background of the whole of Superfund" and ultimately held that § 114(c) does not mean what it says.

This approach to resolving the preemption issue raised here ignores this Court's holding last term in *Aloha Airlines v. Director of Taxation*[1], 104 S. Ct. 291 (1983). In striking down Hawaii's tax on airline gross receipts as preempted by "the plain language of 49 U.S.C. § 1513(a)," this Court characterized the Hawaii Supreme Court's approach as "looking beyond the language of § 1513(a) to Congress's purpose in enacting the statute." 104 S. Ct. at 294. The Court condemned this technique for avoiding federal preemption where Congress has expressly preempted state law:

> We cannot agree with the Hawaii Supreme Court's analysis. First, when a federal statute unambiguously forbids the States to impose a particular kind of tax on an industry affecting interstate commerce, courts need not look beyond the plain language of the federal statute to determine whether a state statute that imposes such a tax is preempted.[2] Thus, the Hawaii Supreme Court erred in failing to give effect to the plain meaning of § 1513(a).
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> . . . .
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> The Hawaii Supreme Court apparently considered itself obliged by *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), and its progeny to examine thoroughly Congress's intention before declaring Haw. Rev. Stat. § 239-6 preempted. *In re Aloha Airlines, Inc.*, 65 Haw. 1, 13-16, 647 P.2d 263, 272-273 (1982). *Rice* and its progeny, however, involved the implicit preemption of state statutes. Rules developed in these cases apply when a court must decide whether a state law should be preempted even though Congress has not expressly legislated preemption. These rules, therefore, have little application when a court confronts a federal statute like § 1513(a) that explicitly preempts state laws. 104 S. Ct. at 294. (footnote 6 omitted).

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[1] *Aloha* was not decided when this case was first briefed. It was called to the New Jersey Supreme Court's attention by letter memorandum prior to oral argument, but was not acknowledged in that court's opinion.

[2] The relationship between this federal statute and the Hawaii legislation in *Aloha* is comparable to the relationship between the federal and state laws here at issue. The 1970 Airport & Airway Development Act imposed, *inter alia*, an 8% federal tax on domestic airline tickets, which was used to establish a "Trust Fund to finance federal resources to local airport expansion and

The New Jersey Supreme Court has similarly refused to respect the plain meaning of an explicit preemption provision of federal law. This disregard for settled principles used in resolving preemption issues, standing alone, merits review of the lower court's decision.

This "plain meaning" rule further requires that the words of a statute are to be given their ordinary meaning unless a different use is clearly indicated. Only if there is substantial unambiguous evidence supporting a contrary interpretation is it necessary to look beyond the words of the statute itself. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982); *Matula v. Consolidation Coal Co.*, 647 F.2d 427, 430 (4th Cir. 1971).

The meaning of §114(c) of Superfund is clear on its face; it is directed toward eliminating double taxation for the same purposes as Superfund and is not directed toward eliminating duplicative spending for the same costs as Superfund. Congress did not refer to claims which are, in fact, compensated under Superfund, but rather those which may be compensated under Superfund. This choice of language by Congress cannot be ignored. The phrase "may be compensated" was used by Congress instead of "has been compensated" or "is compensated" for the very reason that its plain and inherent meaning connotes possibility. See *Bennett v. Panama Canal Co.*, 475 F.2d 1280, 1282 (D.C. Cir. 1973); *John Reiner & Co. v. United States*, 325 F.2d 438, 441 (Ct. Claims 1963), *cert. denied*, 377 U.S. 931 (1964).

Despite the above, the courts below found that "[t]he seemingly simple, but often misused and misapplied word 'may' is anything but unambiguous. The word 'may' is often subject to differing meanings when used in statutory construction." *Exxon Corp. v. Hunt*, 4 N.J. Tax at 297, *cited with approval at*, 97 N.J. at 534. As the sole authority for this conclusion regarding the

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improvement projects." To avoid a double tax burden on the airline industry, subsequent amendments provided that "no state . . . shall levy or collect a tax . . . on persons travelling in air commerce . . . ." 104 S. Ct. at 292. Hawaii sought to escape the preemptive effect of the federal statute by reading the federal statute as only preempting a tax on air carriers, not air passengers.

ambiguous nature of the word 'may,' the opinions below relied upon a line of cases involving the delegation of ministerial power to a public official. *E.g., Kraft v. Board of Educ. of Distr. of Columbia*, 247 F. Supp. 21, 24-25 (D.D.C. 1965), *cert. denied*, 386 U.S. 958 (1967). Such a factual context is entirely absent from the instant matter, which involves the use of the words "may be." "May be," in the context of §114(c), connotes the *possibility* (as opposed to the actuality) of compensation and does not reach the consideration of permissiveness at all.

Even more obviously, the interpretation of §114(c) adopted by the courts below violates a second fundamental rule of statutory construction, requiring that effect must be given, if possible, to every word, clause or sentence of a statute. That is, a statute must be construed so that no part of it is made inoperative, redundant or superfluous. *Colautti v. Franklin*, 439 U.S. 379, 392 (1979); *United States v. Palmeri*, 630 F.2d 192, 199 (3rd Cir. 1980), *cert. denied*, 450 U.S. 967 (1981), *cert. denied sub nom., Carlello v. United States*, 450 U.S. 983 (1981).

The holding of the New Jersey Supreme Court as to the scope of preemption under §114(c) was that "[t]he Spill Tax imposed on plaintiffs is not preempted by section 114(c) of Superfund insofar as Spill Fund is used to compensate hazardous waste clean-up costs and related claims that are either not covered *or not actually paid* under Superfund." *Exxon Corp. v. Hunt*, 97 N.J. at 544 (emphasis added). That is, the New Jersey Supreme Court interpreted §114(c) as providing that plaintiffs cannot be taxed for costs already paid by the federal fund. As long as the State restrains itself from paying clean-up costs and related claims *already paid* by the federal government, it may use its industry-financed fund for any purpose it so chooses.

It is respectfully submitted that such a holding as to the scope of preemption under §114(c) amounts to absolutely no preemption at all and, therefore, renders the provision meaningless, a clearly improper result. It presupposes that Congress enacted §114(c) to preclude solely the possibility that a State would pay on claims already compensated by Superfund. This would hardly require a specific and express statutory provision.

In addition, §114(c) addresses itself to *taxing*, not spending. The spending of monies from a state fund to award duplicate compensation is directly addressed in §114(b). To reduce clause (c) of §114 to a total redundancy of clause (b) cannot be presumed to have been the intention of Congress in enacting that provision.

The decisions of the courts below also nullify any congressional intent in drafting the second sentence of §114(c), which provides:

> [N]othing in this section shall preclude any State from using general revenues for such a fund, or from imposing a tax or fee upon any person or upon any substance in order to finance the purchase or prepositioning of hazardous substance response equipment or other preparations for the response to a release of hazardous substances which affects such State.

42 U.S.C. §9614(c).

If the State is permitted to continue to collect an industry tax for all purposes, with the only limitation being payments on claims *already paid* under Superfund, there would be absolutely no purpose in providing for the use of general revenues for a separate State clean-up fund, unless Congress intended to permit such a fund to be used to pay for bills already paid on the federal level. Such a construction renders the second sentence of §114(c) absolutely meaningless or ludicrous.

Finally, the courts below made inappropriate and misleading use of the legislative history of Superfund in an attempt to bolster the State's construction of §114(c).

When confronted with a statute which is plain and unambiguous on its face, courts do not look to legislative history as a guide to its meaning. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 184 n.29 (1978). The language and meaning of §114(c) of Superfund are clear and evince the intention of Congress to prevent duplicative taxation of the petroleum and chemical industries by the prohibition against State industry-supported funds whose *purposes* are covered by Superfund. Plaintiffs submit that concluding that the meaning of §114(c) of Superfund is clear and unambiguous obviates the necessity of

searching legislative history to divine congressional intent. Creation of an ambiguity in an otherwise clear and unambiguous statute by reference to legislative history is improper. *Matala v. Consolidation Coal Co.*, 647 F.2d at 430.

Nevertheless, the legislative history surrounding the passage of Superfund in whole supports, rather than negates, plaintiffs' claim that taxation under the New Jersey Act is preempted by the Superfund legislation. Superfund was a compromise measure passed during the closing sessions of the 96th Congress. The compromise was achieved on the basis of four predecessor bills. In the House, there were two separate bills: H.R. 7020, 96th Cong. 2d Sess. (1980), which covered only inactive waste sites, and H.R. 85, 96th Cong. 2d Sess. (1980), which covered spills of oil and hazardous wastes into navigable waters. H.R. 7020 did not contain any preemption provisions. H.R. 85 contained preemption clauses in §110 and §302 of that bill. From the remarks of its sponsor, it is clear that the purpose of the clauses was to prevent a state from imposing a tax or fee on oil or other hazardous substances if the tax or fee was to go into a fund, the purpose of which was to pay claims compensable under the Act. 125 Cong. Rec. 384-87 (1979).

In the Senate, there were also two earlier versions of Superfund S. Rep. 1341, 96th Cong. 2d Sess. (1980), which was sponsored by the Administration, preempted the States from requiring a person to contribute to any fund the purpose of which was to pay compensation for a claim which may be asserted under the Act. S. Rep. 1480, 96th Cong. 2d Sess. (1980) originally did not involve a feedstock tax and contained no preemption language. Amendments were introduced to it on September 24, 1980. The written explanation for the amendments containing the preemption language was that it was to prevent states from establishing their own overlapping and duplicative systems and to make S. 1480 consistent with H.R. 85 and S. 1341. 126 Cong. Rec. 27,086 (1980). It specifically stated:

> This amendment provides that claims may be asserted under this act (other than claims relating to closed hazardous waste disposal

facilities) may not be asserted under other laws and that the states are preempted from establishing funds or imposing financial responsibility requirements for such claims. The amendment would expressly not prevent the states from providing remedies for damages not covered by S. 1480. In addition, states would specifically retain their authority to impose taxes or fees for the purchase of cleanup equipment. This amendment is consistent with both S. 1341, the administration's proposal, and H.R. 85, the House companion bill which passed the House on September 19, 1980.

126 Cong. Rec. 27, 086 (1980).

When the final version was passed in the Senate, the vast majority of the remarks of the Senators support the contentions of the Appellants. See 126 Cong. Rec. 30,930-87 (1980).

When the House passed the Senate version of the bill, Representative Florio made it clear that his understanding of the extent of the preemption language in §114(c) was that "... States may not create duplicate funds to pay damages compensable under this bill. . . ." 126 Cong. Rec. 31,965 (1980).

Ignoring all the above-cited legislative history, the New Jersey Courts instead chose to excerpt a few sentences from the remarks of Senators Bradley and Randolph, out of context, in order to support their conclusion, *Exxon Corp. v. Hunt*, 97 N.J. at 538-39. In addition, the New Jersey Supreme Court improperly resorted to the use of legislative history created almost four years later on a bill that was never enacted. *Id.* at 539-46. *See Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13 (1980) (condemning reliance on such *post hoc* "legislative history.") The court compounded this error by also relying on a self-serving EPA March 1982 memorandum, which at best can be described as ambiguous. [9] Certainly, the

[9] In *New Jersey v. United States*, 16 E.R.C. 1846, 1849 (D.D.C. 1981), the Court held in November 1981 that EPA had "taken no position on the scope of § 114(c)," and observed that it did "not even have in place an administrative mechanism for forming an authoritative position on the section." The court went on to observe that "there has been no delegation of power from the President to any agency to enforce the section." *Id.*

guidance memorandum, insofar as it attempts to interpret the question of federal preemption of state taxation, touches upon an area beyond the expertise of the EPA, and beyond the authority delegated to it under Superfund, and would in no way be controlling on the courts or entitled to the deference given it by the Supreme Court of New Jersey. *See, General Electric Co. v. Gilbert*, 429 U.S. 125, 141-43 (1976). Moreover, even when an agency has such authority, its vacillations concerning the meaning of the statute undermine the deference which courts might give to the Agency's most recent interpretation of the statute. *Secretary of the Interior v. California*, 104 S. Ct. 656, 660-61 n.6 (1984).

In enacting Superfund, Congress embarked the fifty states upon a five year experiment in a national response to hazardous waste clean-up and containment. For this five year period, the federal government, through the EPA, with substantial state participation and input, undertook a leadership role in cleaning up those sites across the nation which pose the greatest danger to the health and safety of American citizens, and to coordinate remedial and removal efforts at such sites. To achieve this goal, Congress included in Superfund's comprehensive liberal response authority a site identification program, a response funding mechanism and a range of enforcement tools and cost recovery measures.

The judgment of Congress in structuring Superfund was that the most efficient and economical means of financing such a national effort would be through a 1.6 billion dollar federal fund, financed primarily by a federal feedstock tax levied upon the petroleum and chemical industries, and supplemented by voluntary cleanups by industry, negotiated settlements with responsible parties and enforcement suit recoveries against legally responsible parties. In exchange for eligibility to receive federally-collected industry tax dollars to finance 90% of the cost of remedial site cleanup, and 100% of the financing in the case of removal activity, states were precluded, for Superfund's five year duration, from taxing those same industries for the same purposes as the federal government is taxing them.

Superfund is very clear as to the scope of its preemption. It expressly *does not* preempt States from exercising their power to clean up hazardous waste left unaddressed by Superfund. The sole effect of §114(c) is to remove one specific source of revenue to finance state clean-up activities in return for Superfund financing. Section 114(c) leaves to States the option to finance Superfund-eligible, but not actually compensated, expenditures out of general revenues, bonding programs or any other means. In fact, New Jersey has done this by authorizing a $100 million bond issue in 1981, specifically to provide for the costs of clean-up and removal of hazardous discharge, either not eligible for clean-up under the New Jersey Act or for which monies available under the New Jersey Act are insufficient. None of this money has yet been expended, however. Instead, New Jersey has continued to expend Spill Fund revenues on Superfund sites.

It is evident that the real thrust of the New Jersey Courts' consideration of the preemption issue was their fear that literal compliance with Congress' mandate in §114(c) would jeopardize hazardous waste clean-up in the State. As discussed above, this is an unwarranted conclusion. It is respectfully submitted, however, that it is also irrelevant to this case. The issue as to who should fund hazardous waste clean-up, and in what proportions, was debated and resolved in the Congress of the United States. It was the final determination of Congress that the responsibility of the petro-chemical industry in regard to hazardous waste clean-up efforts should be limited to contributing 87.5% of the $1.6 billion federal Fund. Additional taxation of this specific group of taxpayers for the same purposes by any other taxing authority was specifically prohibited by §114(c) because Congress determined that it would place too much of a burden on the industry and interfere not only with interstate commerce, but with the country's balance of trade.

The New Jersey Courts considered the preemption issue only as it related to New Jersey. In enacting Superfund, Congress was concerned with the financing of clean-up activity in all 50 states, and how it would affect national corporations whose facilities would now be paying spill taxes nationwide. This

broader perspective on the problem, and concern for its national ramifications, must be respected and upheld, not ignored. It is not for a state court to rewrite a statute to comport with its judgment of what the court might consider a wiser course.

The New Jersey courts may well have felt that federal and state hazardous waste clean-ups were best integrated in a way other than as set forth in §114(c) of Superfund. However, as recently as *Aloha Airlines*, the Court has rejected such reasoning. 104 S. Ct. at 294, n.6. It is for Congress, not the courts, to change the scope of preemption under Superfund. If evidence is presented in the appropriate legislative forum of the need for double taxation, Congress, as it reviews Superfund reauthorization this year, can remove or modify preemption. Until then, courts must interpret and enforce the legislature's will as written. *Id.* at 16, n.10.

New Jersey is the sole forum in which a determination is being pursued. Given the national ramifications of the New Jersey Supreme Court decision on the issue of preemption, this case should be reviewed by this Court at a full plenary hearing.

CONCLUSION

The decision of the New Jersey Supreme Court below upholding the taxing provisions of the New Jersey Superior Court and Court of Appeals should be summarily reversed on the basis of this Court's holding in *Aloha Airlines v. Director of Taxation* or, in the alternative, this Appeal should be accorded plenary review.

Respectfully submitted,

FARRELL, CURTIS, CARLIN & DAVIDSON

By _____

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The BFGoodrich Company,
Union Carbide Corporation,
Monsanto Company and
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APPENDIX

APPENDIX A

In accordance with the requirements of Rule 28.1 of the United States Supreme Court Rules, the following is a listing naming the parent companies, subsidiaries and affiliates of Petitioner Corporations:

EXXON CORPORATION

The subsidiaries and affiliates (except wholly owned) of Exxon Corporation are:

Abu Dhabi Petroleum Company Limited
Abu Dhabi Company for Onshore Oil Operations
Ace Polymer Co., Ltd.
Aditivos Orinoco, C.A.
Adria-Wien Pipeline Gesellschaft mit besohrankter Haftung
Aishin Sekiyu K.K.
Aktiebolaget Svensk Petroleumadministration
Alberta Products Pipe Line Ltd.
Al-Jubail Petrochemical Company
Altona Petrochemical Company Limited
Alyeska Pipeline Service Company
Andian National Corporation, Limited
Arabian American Oil Company
Aramco Overseas Company
Aramco Services Company
A/S Futurum
A/S Hydrantanlaegget Kobenhavns Lufthaven, Kastrup
Asakawa Sekiyu K.K.
Asociacion Civil "Academy La Castellana"
Assistance Services S.A.
Atlas Supply Company
Atlas Supply Company of Canada Limited
Australian Synthetic Rubber Company Limited
Aviation Services Saudi Arabia Limited
Awaji Gas Nenryo Kabushiki Kaisha
Bangkok Aviation Fuel Services Limited
Banshu Ekika Gas K.K.
Bayerische Erdgasleitung G.m.b.H.

BSB Gewerkschaften Brigitta und Elwerath
Betriebafuhrunggesellschaft m.b.H.
Bel-Air Entreposage S.A.
BTAS, Inc.
Building Products of Canada Limited
Byron Creek Collieries Limited
Byron Creek Collieries (1983) Limited
Canada Wide Mines Ltd.
Carnduff Gas Limited
Castle Peak Power Company Limited
Champlain Oil Products Limited
Changi Airport Fuel Hydrant Installation Pte. Ltd.
Chuo Sekiyu Hanbai K.K.
Cia Refinadora Petrola Santo Domingo, Inc.
Colmant Cuvelier Dodge S.A.
Colmar Suriname Oil Company, Ltd.
Compagnie d'Etancheite Africaine en Cote d'Ivoire S.A.
Compania Minera Disputada de Las Condeo S.A.
Comptoir Auxiliaire du Petrole
DFTG Deutsche Flussigerdgas Terminal GmbH
Daihatsu Sekiyu K.K.
Daiichi Kouyu K.K.
Daitsu Sangyo K.K.
Delta Hope & Twine Limited
Depot Petrolier du Grosivaudan
Depots de Petrole Cotiers
Depots Petrolier de la Corse
Det Gronlandske Olieaktieselskab
Deudan-Holding GmbH
Deutsche Erdgas Transport G.m.b.H.
Deutsche Transalpine Oelleitung G.m.b.H.
Devon Estates Limited
Dixie Pipeline Company
Dodge de Mexico S.A. de C.V.
Drivmedelecentralen Aktiebolag
Dukhan Service Company
86129 Canada Ltd.
E S F Limited

Eagle Kenso K.K.
East Japan Oil Development Company, Limited
East Texas Salt Water Disposal Company
Eiko Sekiyu K.K.
Ejendomsaktieselskebet ef 12. juni 1964
Eiwerath Erdol und Erdgas AG
Emirates Oilfield Chemicals Company
Emori Sekiyu K.K.
Emsland-Erdolleitung G.m.b.H.
Erdgas-Verkaufs-Gesellschaft m.b.H.
Escuela Las Morochas, C.A.
Esso Chimie
Esso Energie G.I.E.
Esso Exploration and Production Angola Inc.
Esso Italiana S.p.A.
Esso Malaysia Berhad
Esso of Canada Limited
Esso Resources Canada Limited
Esso Societe Anonyme Francaise
Esso Standard Tunisie S. A.
European Gas & Electric Company
Exact Reisebyra A/S
Excess and Treaty Reinsurance Corporation
446259 Ontario Limited
FPE South Africa (Proprietary) Limited
F.T. Giken Kabushiki Kaisha
Federal Pacific Electric de Mexico S.A. de C.V.
Federal Pioneer Limited
Ferngas Nordbayern G.m.b.H.
Ferngas Salzgitter GmbH
Forenade Svenska Oljeimportorers AB
Forjan de Colombia, S.A.
Fuji Kogyo K.K.
Fuji Uuyu K.K.
Fukui Sekiyu K.K.
General Busaan K.K.
General Highway K.K.
General Petrochemical Industries Limited

General Sekiyu K.K.
General Sekiyu Okinawa Hanbai K.K.
General Shipping Co. Ltd.
General Unyu Kabushiki Kaisha
Geobutane—Lavera
Gewerkschaft Brigitta
Gewerkschaft Elwerath
Gewerkschaft Elwerath & Co. GmbH.
Gewerkschaft Erdol-Raffinerie Deurag-Nerag
Gilbarro do Brasil S.A.—Equipamentos
Goroku Sekiyu K.K.
Grande Escaille Land Company, Inc.
Groupement Immobilier Petrolier
Groupement Petrolier Aviation
Groupement Petrolier du Finistere G.I.E.
Hankyu Ferry K.K.
Hannoversche Erdolleitung G.m.b.H.
Hanshin Kyowa Sekiyu K.K.
Hayakawa Sekiyu K.K.
Heinrich Schneider Spedition GmbH
Hiroshima General Gas Juten Kabushiki Kaisha
Hoei Sekiyu K.K.
Hokuyu Sekiyu K.K.
Houston Regional Monitoring Corporation
Hydranten-Betriebsgesellschaft
Hydrierwerke Poelitz Aktiengesellschaft
Imperial Oil Limited
Imperial Pipe Line Company, Limited, The
Inada Ekka Gas Kabushiki Kaisha
Industrias Reliance S.A. de C.V.
Intecom, Inc.
Interface Mechanisms Inc.
Internationale Gas Transport Maatschappij B.V.
Interprovincial Pipe Line (Alberta) Ltd.
Interprovincial Pipe Line Limited
Interprovincial Pipe Line (NW) Ltd.
Investment Promotion Enterprises Limited
Iranian Oil Participants Limited

Iranian Oil Services (Holdings) Limited
Iranian Oil Services Limited
Iraq Petroleum Company, Limited
Iraq Petroleum Pensions, Limited
Japan Butyl Company Limited
Japan Coal Liquefaction Development Company, Ltd.
Jersey Nuclear-Avco Isotopes, Inc.
K.K. Aizu General
K.K. Daimaru
K.K. General Sekiyu Hanbaisho
K.K. Heian Sekiyu
K.K. Kanagawa Sekiyu Shokai
K.K. Kyoei Shoshe
K.K. Kyowa Sekiyu Service
K.K. Marugo Izumasa Shoten
K.K. Niimi Kirun
K.K. Nippatsu
K.K. Standard Sekiyu Osaka Hatsubaisho
K.K. Toko
K.K. Toresen
K.K. Uwano Sekiyu Shokai
K/S ejendomsseiskebet af 8, oktober 1965
K/S Hoje Taastrup Storcenter 11
K/S Statfjord Transport A/S & Co.
Kabushiki Kaisha Sankyo Plastics
Kai Tak Refuellers Company Limited
Kanto Kygnus Sekiyu Hambai K.K.
Karlsruhe-Stuttgart Rohrleitung Gesellschaft mbH
Kawasaki Kyguna Sekiyu Hambai Kabushiki Kaisha
Kawasaki Naiko Kabushiki Kaisha
Keihin Kygnus Kabushiki Kaisha
Keiyo Sekiyu Hanbai K.K.
Kenya Petroleum Refineries Limited
Kepco Mfg. Inc.
Kibo Sekiyu Hanbai K.K.
Kiinteisto Oy Myllynksllio
Kinwa Sekiyu K.K.
Kobe Port Service Kabushiki Kaisha

Kobe Standard Sekiyu K.K.
Kowa Sekiyu K.K.
Kowloon Electricity Supply Company Limited
Kygnus Ekka Gas Kabushiki Kaisha
Kygnus Kosan Kabushiki Kaisha
Kygnus Sekiyu K.K.
Kyushu Eagle K.K.
LFL Investments, Inc.
La Compagnie Electrique Pioneer du Quebec, Inc.
Lakehead Pipe Line Company, Inc.
LEAG Aktiengesellschaft fur luzerisches Erdol
Les Dooks des Petroles d'Ambes
Les Restaurants Le Voyageur Inc.
Long Beach Oil Development Company
Magota Sekiyu K.K.
Magyar Amerikai Olajipari Reszvenytarsasag
Mainline Pipelines Limited
Makoto Sekiyu Kabushiki Kaisha
Maortgaz Ertekesito R.T.
Maple Leaf Petroleum Limited
Maquinas de Coser y Border Sigma, S.A.
Mars-Alcatel, S.A.
Marugo Gas K.K.
MEGAL FINCO
MEGAL GmbH
Meiji Sekiyu K.K.
MESBIC Financial Corporation of Houston
Mikawa Bussan K.K.
Mittelrheinische Erdgas Transport Gesellschaft mit beschrankter Haftung
Mongeau & Robert Cie Ltee
Montreal Pipe Line Limited/Les Pipe-Lines Montreal Limitee
Moraine Properties Ltd.
95269 Canada Limited
Nakabayashi Sekiyu K.K.
Nansei Sekiyu Kabushiki Kaisha
Native Venture Capital Co. Ltd.

Near East Development Corporation
Neptune Bulk Terminals (Canada) Ltd.
Nichimo Kabushiki Kaisha
Nichimo Oil (Bermuda) Co., Ltd.
Nichimo Sekiyu Seisei Kabushiki Kaisha
Nikko Sangyo K.K.
Nippon Unicar K.K.
Nisku Products Pipe Line Company Limited
Nissei Sekiyu Kabushiki Kaisha
Norddeutsche Erdgas-Aufbereitungs G.m.b.H.
Norddeutsche Mineraloelwerke Stettin G.m.b.H.
Norddeutsche Oelleitungs-gesellschaft m.b.H.
Nordrheinische Erdgas Transport Gesellschaft mit beschrankter Haftung
Nord-West Oelleitung G.m.b.H.
Northward Developments Ltd.
Northwest Company, Limited
Nottingham Gas Limited
107580 Canada Inc.
Office Prive d'Assurances et de Courtages
Offshore Medical Support Limited
Oil Field Chemicals Company (Saudi Arabia) Ltd.
Oil Service Company of Iran (Private Company)
Oil Transport Company (Saudi Arabia) Limited
Oldenburgische Erdol Gesellschaft m.b.H.
Osaka Propane Gas Hambai Kabushiki Kaisha
Osaka Sekiyu Gas Yuso K.K.
P.T. Stonvac Indonesia
Pars Investment Corporation
Peninsula Electric Power Company Limited
Petrole Assistance Lyon (S.A.R.L.)
Petrole Assistance Marseille (S.A.)
Petrole Assistance Orleans (S.A.R.L.)
Petrole Assistance Paris T.R. (SA)
Petroleum Refineries (Australia) Proprietary Limited
Petroleum Services (Middle East) Limited
Petroleum Tankship Company, Inc.
Petrosvibri S.A.

Pipeline Service
Pipe Line Service Company, Inc.
Pipeline Service Iran
Pipeline Service U.K.
Pipe Line Services, Inc.
Plantation Pipe Line Company
Polder-Seehafen-Harburg GmbH
Polyolefins Product Co. Pty. Ltd.
Portland Pipe Line Corporation
Potencia Industrial S.A.
Productos Lorain de Mexico S.A. de C.V.
Progas A/S
Qatar Petroleum Company Limited
Qualbank, Inc.
Raffinerie du Midi S.A.R.L.
Rainbow Pipe Company, Ltd.
Redwater Water Disposal Company Limited
Refineria Petrolera Acajutla, S.A.
Reliance Electric & Engineering Company de Mexico S.A. de C.V.
Reliance Electric Limited
Reliance Electric Ltd.
Reliance Electric S.A. (Spain)
Renix Co. Ltd.
Renown Building Materials Limited
Rheingas Erdgasleitungs-Gesellschaft m.b.H.
Rotterdam-Antwerpen Pijpleiding (Nederland) N.V.
Ruhrgas Aktiengesellschaft
S.A. du Pipeline a Produits Petroliers sur Territoire Genevoia (SAPPRO)
S & M Pipeline Limited
S.O.P.—Societa Oleodotti Padani S.p.A.
Saitama Sekiyu Hanbai K.K.
Sakurajima Futo K.K.
Sanko Oil Kabushiki Kaisha
Sanwa Kasei Kogyo Kabushiki Kaisha
Sanyo Sekiyu K.K.
Saraco S.A.

Schubert KG
SEAG Aktiengesellschaft fur schweizerisches Erdol
Seibu Kygnus Sekiyu Hambai Kabushiki Kaisha
Seismic Industries A/S
Senpoku Oil Service K.K.
SERAM Societa per Azioni
Servacar Ltd.
Shehtah Drilling Limited
Shimoka Skiyu Kabushiki Kaisha
Shimoyama Sekiyu K.K.
Shin-Nihon Yukagaku Kogyo K.K.
Shinohara Oil K. K.
Shizuoka Kanesho Hambai Kabushiki Kaisha
Smiley Gas Conservation Limited
Sociedad Anonima "Escuela Campo Alegre"
Sociedad de Inversiones de Aviacion
Sociedad Nacional de Oleoductos Ltda.
Societa per Azioni Raffineria Padana Olii Minerali—SARPOM
Societe Anonyme de la Raffinerie des Antilles
Societe Anonyme des Hydrocarbures
Societe Anonyme "Produits Lubrifiants de Madagascar"—PROLUMA S.A.
Societe Civile de Mustapha Algerie
Societe Civile de Participation pour la Destruction des Dechets Industriels (SOCDI)
Societe Civile Immobiliere "Courcelles-Etoile"
Societe Civile Immobiliere de la Croix au Chene
Societe Civile Immobiliere du 195 Avenue de Neuilly
Societe Civile Immobiliere Khariesse
Societe Civile Immobiliere "Kleber-Etoile"
Societe Civile Immobiliere "Les Casseaux-Bougainville"
Societe de la Raffinerie d'Alger
Societe de la Raffinerie de Lorraine
Societe de Manutention de Carburants Aviation
Societe de Manutention de Carburants Aviation DakarYoff, S.A.

Societe de Promotion et de Financement Touristique (CARTHACO)
Societe d'Entrepoisage de San-Pedro
Societe des Pipe-Lines de Strasbourg
Societe des Transports Petroliers par Pipe Line
Societe d'Exploitation & de Development d'Operations Commerciales
Societe du Ceoutohouc Butyl (SOCABU)
Societe du Depot Petrolier d'Hauconcourt
Societe du Parkings du Square Boucicaut
Societe du Pipe Line de la Raffinerie de Lorraine
Societe du Pipe-Line Mediterranee-Rhone
Societe Esso de Recherches et d'Exploitation Petrolieres Esso Rep
Societe "Geomines-Caon"
Societe Harvaise de Manutention de Produits Petroliers
Societe Hoteliere de la Petite Compagne
Societe Immobiliere Paris-Niel
Societe Industrielle de Mecanique et d'Equipement Petrolier S.I.M.E.P. (S.A.R.L.)
Societe Italiana per l'Oleodotto Transalpino S.p.A.
Societe Ivoirienne d'Operations Petrolieres S.A.
Societe Malgache de Raffinage
Societe du Pipeline Sud-Europeen
Societe Reunionnaise d'Entreposage
Socony-Standard-Vacuum Oil Company (Petroleum Maatschappij)
Southern Natural Gas Development Pty. Ltd.
Standard Kosan Kabushiki Kaisha
Standard Service K.K.
Statfjord Transport A/S
Stockage Geologque de Gaz de Lavora
Suddeutsche Erdgas Transport Gesellschaft mit beschrankter Haftung
Suntech Company, Ltd.
Supertex, Inc.
Svensk Petroleumlagring Tre Aktiebolag
Syncrude Canada Ltd.

Synergistics Chemicals Limited
305120 Alberta Ltd.
346877 Ontario Limited
TAR-Tankanlage Rumlang AG
TBN Tanklager-Betriebsgesellchaft Nurnberg mbH
Taihei Bussan K.K.
Taiko Skiyu K.K.
Taisei Kogyo Sekiyu Hanbai K.K.
Taketsuru Yugyo K.K.
Tanaka Sekiyu Hanbai K.K.
Tankanlage A.G., Mellingen
Tanklager Altishausen A.G.
Tanklager Gesellschaft
Tanklager-Gesellschaft Tegel
Tanklager Lechelles I.S.A.
Tanklager Taegersohen AG
Tecumseh Gas Storage Limited
THUMS Long Beach Company
Thyssengas G.m.b.H.
TIBA Speditions GmbH
Tos Nenryo Kogyo Kabushiki Kaisha
Tohko Plastics Company, Limited
Tokai General Sekiyu Hanbai K.K.
Toko Sekiyu K.K.
Toledo Scale Company de Mexico S.A. de C.V.
Toledo Werk GmbH
Tonen Energy International Corp.
Tonen Maintenance K.K.
Tonen Seikyuksgaku Kabushiki Kaisha
Tonen Tanker Kabushiki Kaisha
Tonen Technology K.K.
Towa Sekiyu K.K.
Toyoshina Film Company, Ltd.
Transalpine Finance Holdings S.A.
Transalpine Oelleitung in Oesterreich Gesellschaft m.b.H.
Trans-Arabian Pipe Line Company
Transgaz Lavera

Tsurumaru Unyu K.K.
Turkish Petroleum Company, Limited
UBAG—Unterflurbetankungsanlage Flughafen Zurich
Ulupna Estates Limited
Van Salt Water Disposal Company
W.A.G. Pipeline Pty. Ltd.
W.H. Adam, Ltee, Ltd.
Wako Jushi Kabushiki Kaisha
Wako Kaesi Kabushiki Kaisha
Westdeutche Erdolleitungs—G.m.b.H.
Westgas G.m.b.H.
Williamsport Properties Limited
Winnepeg Pipe Line Company Limited
Wohnungsbaugesellschaft, Steimbke-Rodewald G.m.b.H.
Worex Distribution
Wrenford Insurance Company Ltd.
Yasaka Sekiyu, K.K.
Yellowstone Pipe Line Company
Yoshimi Gas Kabushiki Kaisha
Yusi Sekiyu K.K.
Yugan Kaisha Nishi Kobe Dosai Center

BFGOODRICH

Consolidated subsidiary companies of BFGoodrich Company with an ownership of less than 100%:

Bil Tech of California; BFGoodrich Australia Limited; BFGoodrich Chemical Limited; Industria Colombiana de Llantas, S.A.; E.P.P.C Polyplastic S.A.; BFGoodrich Chemical de Venezuela, C.A.

UNION CARBIDE CORPORATION

Union Carbide Corporation states that the United States subsidiaries, excluding wholly owned subsidiaries, and affiliates of Union Carbide are: ACM Services, Inc., Arizona Welding Equipment Co., Miami Welding Supply, Inc., United States Welding, Inc., V.B. Anderson Co. and VBA Cryogenics Corp.

The following are Union Carbide's foreign subsidiaries (except wholly-owned subsidiaries) and affiliates: Union Carbide Egypt S.A.E.; Union Carbide Ghana Limited; Union Carbide Kenya Limited; Union Carbide Nigeria Limited; Union Carbide Sudan Limited; Union Carbide Canada Limited; Chemos Industries Pty. Limited (Australia); Union Carbide Australia Limited; Union Carbide India Limited; P.T. Agrocarb Indonesia; Nippon Unicar Company Limited (Japan); Union Showa K.K. (Japan); Sony Eveready, Inc. (Japan); Union Gas Company Limited (Korea); Union Carbide Malaysia Sdn. Bhd.; Union Polymers Sdn. Bhd. (Malaysia); Union Carbide New Zealand Limited; Union Carbide Ceylon Limited (Republic of Sri Lanka); Indugas N.V. (Belgium); Calida Gas N.V. (Belgium); La Littorale S.A. (France); Argon, S.A. (Spain); Unifas Kemi A.B. (Sweden); Electro Manganes Ltda (Brazil); S.A. White Martins (Brazil): S.A. White Martins Nordeste (Brazil); Union Carbide Mexicana, S.A. de C.V. (Mexico); Electrode Maatskappy Van Suid Afrika (Eiendoms) Beperk (Republic of South Africa); Tubatse Ferrochrome (Proprietary) Limited (Republic of South Africa).

MONSANTO

Domestic and foreign subsidiaries and affiliates of Monsanto Company with an ownership of less than 100%:

Fisher Controls International, Inc.; Fisher Controls Limited; Monsanto (Malaysia) Sdn. Berhad (Monaysia); Nippon Fisher Company, Ltd.; Revertex Industries (N.Z.) Ltd.; ACM Services, Inc.; Agerquim, S.A. de C.V.; Australian Fluorine Chemicals Pty. Limited (A.F.C.); Collagen Corporation; Companhia Brasileira de Estireno (CBE); Daishin Kogyo K.K.; Goyana, S.A. Industrias Brasileiras de Materias Plasticas (GOYANA); Hydrocarbon Products Pty. Ltd. (HPPL); Industrias Resistol, S.A. (IRSA); K.K. Astro Gelande; Kirbi Kasei K.K.; Korag Company Limited; Mitsubishi Monsanto Chemical Company (MMK); Nippon Cooper Kabushiki Kaisha; Plagon S.A.—Plasticos Goyana Do Nordeste (PLAGON); Plax Canada Limited

[now 102975 Canada Limited]; Polyamide Intermediates Limited; Resimor Sinteticos do Nordeste S.A. (RESINOR); Rezinex Australia Limited; Ryonichi Nohken K.K.; Sankyo Kasei Sangyo K.K.; Soperton Gum Market, Inc.; Taiyo Kouyo Kabushiki Kaisha.

TENNECO

Tenneco Chemicals, Inc.'s name has been changed to Tenneco Resins, Inc. Tenneco Resins, Inc. is owned 100% by Tenneco Polymers, Inc., which is owned 100% by Tenneco Corporation, which is owned 100% by Tenneco Inc. which is the ultimate holding company. All of these companies are Delaware corporations. Tenneco Resins, Inc. has no subsidiaries. It does, however, have two affiliate companies, i.e., those which are also owned 100% by Tenneco Polymers, Inc. These are Heyden Newport Chemical Corporation (a Delaware corporation) and Tenneco Eastern Realty, Inc. (a New Jersey corporation).

EXXON CORPORATION, THE BF GOODRICH COMPANY, UNION CARBIDE CORPORATION, MONSANTO COMPANY, AND TENNECO CHEMICALS, INC., PLAINTIFFS-APPELLANTS, v. ROBERT HUNT, ADMINISTRATOR OF NEW JERSEY SPILL COMPENSATION FUND, CLIFFORD A. GOLDMAN, TREASURER OF THE STATE OF NEW JERSEY, SIDNEY GLASER, DIRECTOR OF THE DIVISION OF TAXATION, AND THE STATE OF NEW JERSEY, DEFENDANTS-RESPONDENTS.

EXXON CORPORATION, THE BF GOODRICH COMPANY, UNION CARBIDE CORPORATION, MONSANTO COMPANY, AND TENNECO CHEMICALS, INC., PLAINTIFFS-APPELLANTS, v. ROBERT HUNT, ADMINISTRATOR OF NEW JERSEY SPILL COMPENSATION FUND, CLIFFORD A. GOLDMAN, TREASURER OF THE STATE OF NEW JERSEY, SIDNEY GLASER, DIRECTOR OF THE DIVISION OF TAXATION, JERRY F. ENGLISH, COMMISSIONER OF ENVIRONMENTAL PROTECTION, AND THE STATE OF NEW JERSEY, DEFENDANTS-RESPONDENTS.

Argued January 23, 1984—Decided September 19, 1984

SYNOPSIS

Appeals were taken challenging declaratory judgment of the Tax Court, 4 N.J.Tax 294, determining the extent to which taxing provisions of the New Jersey Spill Fund and Compensation Act are preempted by federal law and the validity of certain regulations promulgated by the state treasurer under the Spill Fund Act. The Superior Court, Appellate Division, Antell,

J.A.D., 190 N.J.Super. 131, 462 A.2d 193, affirmed, and certification was granted. The Supreme Court, Clifford, J., held that tax instituted by the state to establish Spill Fund is not preempted by tax imposed by federal government to create Superfund insofar as Spill Fund is used to compensate hazardous waste cleanup costs and related claims that are either not covered or not actually paid under the Superfund.

Affirmed.

1. States ⇦4.10

An allegation of preemption must be analyzed with reference to whether federal statute expressly or by necessary implication indicates exclusivity, whether federal scheme is so pervasive that it precludes coexistence of state regulation, and whether state program stands as an obstacle to accomplishment and execution of full purposes and objectives of Congress.

2. Statutes ⇦223.1

Courts faced with potentially conflicting state and federal statutes must attempt to harmonize them whenever possible.

3. Statutes ⇦223.1

In determining proper construction of allegedly conflicting statutes, courts must perform essentially a two-step process of first ascertaining construction of the two statutes and then determining constitutional question whether they are in conflict.

4. Statutes ⇦217.4

Reference to legislative history is appropriate not only where statutory language is ambiguous but also where literal interpretation would thwart overall statutory scheme.

5. States ⇦4.10

The tax instituted by the State of New Jersey to establish a Spill Fund to cover costs of environmental cleanup is not preempted by the tax imposed by the federal government to create the Superfund insofar as the Spill Fund is used to compensate hazardous waste cleanup costs and related claims that are either not covered or not actually paid under the Superfund. N.J.S.A. 58:10–23.11 to 58:10–23.11z; Comprehensive Environmental Response, Compensation, and Liability Act of 1980, §§ 101–308, 114(c), 42 U.S.C.A. §§ 9601–9657, 9614(c).

John J. Carlin, Jr., argued the cause for appellants (*Farrell, Curtis, Carlin & Davidson*, attorneys).

Mary C. Jacobson, Deputy Attorney General, argued the cause for respondents (*Irwin I. Kimmelman*, Attorney General of New Jersey, attorney; *Michael R. Cole*, Assistant Attorney General, of counsel).

The opinion of the Court was delivered by

CLIFFORD, J.

In this case we consider one aspect of the staggering problems associated with the release of hazardous substances into our environment. Cleanup and removal efforts have been authorized by the State through the New Jersey Spill Compensation and Control Act, *N.J.S.A.* 58:10–23.11 to –23.11z (Spill Fund), and by the federal government pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, 42 *U.S.C.A.* §§ 9601–9657 (Superfund). This appeal focuses on the taxing structures established by each of the foregoing Acts. More specifically, we address the issue of the constitutionality of Spill Fund—that is, whether the tax imposed by the federal government to create Superfund effectively preempts the tax instituted by the State of New Jersey to establish Spill Fund.

I

Plaintiffs are five petroleum and chemical companies that are currently paying taxes into both Spill Fund and Superfund. After several unsuccessful attempts to have the federal courts determine the scope of section 114(c) of Superfund, 42 *U.S.C.A.* § 9614(c) (see *Exxon Corp. v. Hunt*, 4 *N.J.Tax* 294, 299 n. 4 (1982), for a synopsis of those efforts), plaintiffs filed these consolidated actions challenging the constitutionality of Spill Fund in light of section 114(c) of Superfund. [1]

The parties filed cross-motions for summary judgment. Plaintiffs argued that the Spill Fund tax was preempted by section 114(c) of Superfund, which reads:

> Except as provided in this chapter, no person may be required to contribute to any fund, the purpose of which is to pay compensation for claims for any costs of response or damages or claims *which may be compensated under this subchapter*. Nothing in this section shall preclude any State from using general revenues for such a fund, or from imposing a tax or fee upon any person or upon any substance in order to finance the purchase or prepositioning of hazardous substance response equipment or other preparations for the response to a release of hazardous substances which affects such State. [42 *U.S.C.A.* § 9614(c) (emphasis added).]

Plaintiffs maintained that the principal purpose of the state tax was to compensate hazardous-waste sites that might ultimately be compensated by Superfund, thereby contravening the above-emphasized language of section 114(c) of Superfund.

[1] Plaintiffs filed two complaints, one in the Tax Court and one in the Chancery Division. Both actions asserted that the tax imposed by Spill Fund was preempted by the provisions of Superfund. The complaints differed only in that the Chancery Division action sought additional relief that is not at issue here. On defendant's motion the Chancery Division action was transferred to and consolidated with the Tax Court action.

Defendants, describing Spill Fund as a constitutionally-valid supplement to Superfund, argued that Spill Fund was aimed at providing compensation for those claims that were not receiving Superfund coverage.

Judge Evers granted defendants' motion for summary judgment in the Tax Court. [2] 4 *N.J.Tax* 294. Relying on the legislative history surrounding the enactment of Superfund, as well as on the scope and purposes of both Superfund and Spill Fund, Judge Evers concluded that the Spill Fund tax was not preempted by Superfund.

> The court finds that Congress, through the adoption of [Superfund], has not put an end to the taxing powers of the states for hazardous substance cleanup, containment and remedial purposes by putting another tax in its place. Rather, the court finds that [Superfund] permits a state to continue to avail itself of industry tax funds with the obvious limitation that a double tax could not be collected and expended on any one project. Such would be the practicalities of government where both state and nation have the same and yet separate, identifiable interests. [*Id.* at 320.]

Moreover, Judge Evers alternatively held that even if Spill Fund Tax monies could not be collected for general containment and cleanup purposes, "the [S]pill [F]und law nevertheless encompasses many other areas to which such monies could be devoted which are clearly outside the reach of § 114(c) and which may very well be of sufficient magnitude to sustain the [S]pill [F]und tax." *Id.* at 315. Thus, the court held that "even if § 114(c) of [Superfund] could be construed to preempt part of [S]pill

[2] All but two counts of plaintiffs' consolidated complaints were dismissed. 4 *N.J.Tax* 294, 320 (1982). The remaining two counts were severed from the rest of the case for purposes of appeal.

[F]und, * * * nonpreempted areas [3] are more than sufficient to sustain its continued validity." *Id.* at 320 (footnote added).

On plaintiffs' appeal the Appellate Division affirmed, "substantially for the reasons stated by Judge Evers in his written opinion * * *." 190 *N.J.Super.* 131, 132–33 (1983). [4] We granted certification, 94 *N.J.* 607 (1983), to determine whether "the plain language of § 114(c) of Superfund preempt[s] the State of New Jersey from collecting taxes under the taxing provision of the [Spill Fund] as presently enacted", and now affirm.

II

Spill Fund was enacted in 1977, L.1976, c. 141, with the expressed legislative intent to

[3] The areas that Judge Evers found to be "non-preempted," and therefore eligible for Spill Fund compensation, included the following: the purchase and prepositioning of hazardous-response equipment; the cleanup of petroleum and crude oil spills; payment of third-party damage claims; and the Superfund provision that a state contribute ten percent or more of the costs of remedial action, including future maintenance, in order to qualify for federal funding (42 *U.S.C.A.* § 9604(c)(3)). 4 *N.J.Tax* at 316–17.

[4] During the time between the oral argument before Judge Evers and the rendering of his decision, the New Jersey Department of the Treasury published proposed regulations governing expenditures under Spill Fund. Plaintiffs submitted timely comments to these proposed regulations, but due to an error within the Department of the Treasury those comments were deemed to be "untimely and need not be considered." The regulations were thereafter adopted. Plaintiffs challeged the validity of the regulations by appeal to the Appellate Division. That appeal was subsequently consolidated with the appeal of Judge Evers' decision; and although the Appellate Division concluded that the Department of the Treasury had failed to comply with the Administrative Procedure Act and that the regulations were invalid and without force and effect, defendants have not sought review of that issue by the Court. We therefore restrict our attention to the issue of preemption as considered by Judge Evers.

> exercise the powers of this State to control the transfer and storage of hazardous substances and to provide liability for damage sustained within this State as a result of any discharge of said substances, by requiring the prompt containment and removal of such pollution and substances, and to provide a fund for swift and adequate compensation to resort businesses and other persons damaged by such discharge. [*N.J.S.A.* 58:10–23.11a.]

This statute provides for the establishment of "a nonlapsing, revolving fund in the Department of the Treasury to carry out the purposes of this act." *N.J.S.A.* 58:10–23.11i. The fund's revenues are supplied by a tax "levied upon each owner or operator of one or more major facilities [5] * * * to insure compensation for cleanup costs and damages associated with any discharge of hazardous substances * * *." *N.J.S.A.* 58:10–23-11h(a) (footnote added).

In December 1980 Superfund was enacted in response to escalating national hazardous-waste problems. Congress provided for the establishment of a $1.6 billion fund over a five-year period [6] for the cleanup and removal of pollution caused by the release of hazardous substances into the environment. Superfund imposes a tax to finance the federal fund, taxing chemical indus-

[5] A "major facility" is defined by the statute as including "any refinery, storage or transfer terminal, pipeline, deep water port, drilling platform or any appurtenance related to any of the preceding that is used or is capable of being used to refine, produce, store, handle, transfer, process or transport hazardous substances." *N.J.S.A.* 58:10–23.11b(*l*). It is undisputed that each plaintiff operates a major facility. 4 *N.J.Tax* at 301 n. 5.

[6] Superfund is scheduled to expire in 1985. However, on August 10, 1984 the House of Representatives passed H.R. 5640, "Superfund Expansion and Protection Act of 1984," which provides for additional funding of $10.2 billion between 1985 and 1990. The bill, authored by Rep. James Florio of New Jersey, passed by a vote of 323 to 23. While the legislation must still face the scrutiny of the Senate, and ultimately the President, it appears likely that some form of Superfund legislation will be extended beyond 1985. See *infra* at 539–541 & notes 8, 9.

tries to acquire 87.5% of the funds necessary for cleanup efforts and relying on general federal revenues to account for the remaining 12.5% of the fund. 126 *Cong.Reg.* S14967–68 (daily ed. Nov. 24, 1980) (statement of Sen. Stafford).

The focal point of plaintiffs' preemption argument is that language of section 114(c) of Superfund that excludes contribution to any fund whose purpose is to pay compensation for claims "for any costs of response or damages or claims which *may be compensated* under this subchapter." 42 *U.S.C.A.* § 9614(c) (emphasis added). Plaintiffs maintain that through this section of Superfund, read in conjunction with Article VI, clause 2 of the United States Constitution[7], Congress expressly preempted New Jersey's Spill Fund taxation scheme.

[1, 2] As Judge Evers noted,

> [i]t is fundamental that where a state statute conflicts with a federal statute which has preempted the field and stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, the Supremacy Clause of the United States Constitution mandates that the state statute must fail. [4 *N.J.Tax* at 304.]

An allegation of preemption must be analyzed with reference to several general guidelines: "Does the federal statute expressly or by necessary implication indicate exclusivity? * * * Is the federal scheme so pervasive that it precludes coexistence of state regulation? * * * [and] Does the state program stand 'as an obstacle to the accomplishment and execution of the full pur-

[7] This clause of the United States Constitution, more commonly referred to as the supremacy clause, provides:

> This Constitution, and the Laws of the United States which shall made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

poses and objectives of Congress'?". *U.S.A. Chamber of Commerce v. State*, 89 *N.J.* 131, 142 (1982) (citations omitted); *see also Feldman v. Lederle Laboratories*, 97 *N.J.* 429, 458 (1984) (discussing question of preemption in products liability field). However, courts faced with potentially conflicting state and federal statutes must attempt to harmonize them whenever possible. *Florida Lime & Avocado Growers v. Paul*, 373 *U.S.* 132, 83 *S.Ct.* 1210, 10 *L.Ed.*2d 248 (1963); *Huron Cement Co. v. Detroit*, 362 *U.S.* 440, 80 *S.Ct.* 813, 4 *L.Ed.*2d 852 (1960). "Pre-emption of state law by federal statute is not favored 'in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakenly so ordained.'" *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 *U.S.* 311, 317, 101 *S.Ct.* 1124, 1130, 67 *L.Ed.*2d 258, 264–65 (1981) (quoting *Florida Lime & Avocado Growers, supra*, 373 *U.S.* at 142, 83 *S.Ct.* at 1217, 10 *L.Ed.*2d at 257).

[3] Thus, in determining the proper construction of allegedly conflicting statutes, courts must perform "essentially a two-step process of first ascertaining the construction of the two statutes and then determining the constitutional question whether they are in conflict." *Chicago & N.W. Transp. Co., supra*, 450 *U.S.* at 317, 101 *S.Ct.* at 1130, 67 *L.Ed.*2d at 265 (quoting *Perez v. Campbell*, 402 *U.S.* 637, 644, 91 *S.Ct.* 1704, 1708, 29 *L.Ed.*2d 233, 239 (1971)).

Moreover, as the Courts in *Florida Lime & Avocado Growers, supra*, 373 *U.S.* 132, 83 *S.Ct.* 1210, 10 *L.Ed.*2d 248, explained, it is not a question of "whether the *purposes* of the two laws are parallel or divergent," but rather a court must determine "whether both regulations can be enforced without impairing the federal superintendence of the field * * *." *Id.* at 142, 83 *S.Ct.* at 1217, 10 *L.Ed.*2d at 156-57 (emphasis in original).

Although plaintiffs argue in favor of the "plain meaning" rule of statutory construction, see 2A *Sutherland Statutory Construction* § 46.01 (C.Sands 4th ed. 1973), we conclude, as did the Supreme Court in *Jones v. Rath Packing Co.*, 430 U.S. 519, 97 *S. Ct.* 1305, 51 *L.Ed.*2d 604 (1977), that "[t]his inquiry requires us to consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written." *Id.* at 526, 97 *S. Ct.* at 1310, 51 *L.Ed.*2d. at 614. The pertinent language of section 114(c), that "no person may be required to contribute to any fund, the purpose of which is to pay compensation for claims for any costs of response or damages or claims which *may be compensated* under this subchapter" (emphasis added), may appear to be clear *language* at first glance, but we can hardly conclude that it conveys a clear and unambiguous *meaning* in light of the purpose and spirit of Superfund as a whole. We are reminded of Judge Learned Hand's ubiquitous observation of some forty years ago:

> There is no surer way to misread any document than to read it literally * * *.
> * * * As nearly as we can, we must put ourselves in the place of those who uttered the words, and try to divine how they would have dealt with the unforeseen situation; and although their words are by far the most decisive evidence of what they would have done, they are by no means final. [*Guiseppi v. Walling*, 144 *F.*2d. 608, 624 (2d. Cir. 1944) (L. Hand, Jr., concurring), aff'd. *sub nom. Gemsco, Inc. v. Walling*, 324 *U.S.* 244, 65 *S.Ct.* 605, 89 *L.Ed.* 921 (1945).]

As plaintiffs read "may be compensated", the phrase implicates only a permissive meaning. In other words, plaintiffs claim that if New Jersey's Spill Fund has as its purpose to pay compensation for claims that "might conceivably be compensated" by Superfund, then plaintiffs cannot be required to pay into Spill Fund. Thus, plaintiffs maintain that the Court's function is to

apply the statute according to its stated terms without the aid of legislative history or extrinsic evidence.

However, as Judge Evers pointed out, "[t]he seemingly simple, but often misused and misapplied word 'may' is anything but unambiguous." 4 *N.J. Tax* at 307. The standard-dictionary definition of the word "may" ranges from "have the ability or competence to," *Webster's Third New International Dictionary* 1396 (1971), and "be in some degree likely to," *id.*, to "shall, must—used esp[ecially] in deeds, contracts, and statutes," *id.*, and "shall, must—used in law where the sense, purpose, or policy requires this interpretation," *Webster's New Collegiate Dictionary* 711 (1976). A legal-dictionary definition of the word "may" states that "[r]egardless of the instrument, however, whether constitution, statute, deed, contract or whatever, courts not infrequently construe 'may' as 'shall' or 'must' to the end that justice may not be the slave of grammar." *Black's Law Dictionary* 883 (rev. 5th ed. 1979). One court discussed this dilemma in *Kraft v. Board of Educ. for D.C.*, 247 *F.Supp.* 21 (D.D.C.1965), *cert. denied*, 386 *U.S.* 958, 87 *S.Ct.* 1026, 18 *L.Ed.*2d 106 (1967):

> It is well established, however, that the word "may" can be construed to be "shall", just as the word "shall" may be construed to mean "may". The interpretation of those words depends upon the context in which they are used and the intention of the legislative body as is shown by the statute and as may be gleaned from committee reports and similar authoritative sources. [*Id.* at 24–25.]

Accord Bell v. Western Employer's Ins. Co., 173 *N.J.Super.* 60, 65 (App.Div.1980) (in dictum, noting that "may" and "shall" "may be deemed interchangeable when necessary to execute the clear intent of the Legislature"); *MacNeil v. Ann Klein*, 141 *N.J.Super.* 394, 402 (App.Div.1976) (in dictum, "the word 'may' should be given the meaning which conforms to the legislative intent").

[4] Thus, plaintiffs' reliance on any notion of a "plain meaning" rule in this situation must fail. Moreover, as Judge Evers stated, "[r]eference to legislative history is appropriate not only where the statutory language is ambiguous but also where a literal interpretation would thwart the overall statutory scheme." 4 *N.J.Tax* at 307–08 (citing *International T & T Corp. v. General T. & E. Corp.*, 518 *F.*2d 913, 921 (9th Cir.1975)). We therefore direct our attention to the meaning of section 114(c) in the context of the supportive provisions of Superfund and the legislative background of the whole of Superfund.

Although it may be true that many of the purposes to which Superfund moneys are put overlap with the purposes of Spill Fund, this fact alone does not require a conclusion of preemption. In *Florida Line & Avocado Growers, supra,* 373 *U.S.* 132, 83 *S.Ct.* 1210, 10 *L.Ed.*2d 248, the Court stated that the contention that such a situation compels preemption tends to "obscure more than aid in the solution of the problem. * * * This Court has, on one hand, sustained state statutes having objectives virtually identical to those of federal regulations * * * and has, on the other hand, struck down state statutes where the respective purposes were quite dissimilar * * *." *Id.* at 141–42, 83 *S.Ct.* at 1217, 10 *L.Ed.*2d at 256 (citations omitted). Hence, it is far more useful to examine a challenge of preemption in the light of what Congress intended the relationship to be between Superfund and state statutes such as Spill Fund.

Whereas plaintiffs contend that the language used in section 114(c) of Superfund demonstrates an intent on the part of Congress to repose in the federal government exclusively the power to maintain a fund for the cleanup and removal of hazardous substances, it is clear from the surrounding provisions of Superfund and its legislative history that Congress actually envisioned a cooperative arrangement between the federal and state

governments. Superfund recognizes its limits and in fact provides for active state financial and technical cooperation in hazardous-waste cleanup activities. *See, e.g.,* 42 *U.S.C.A.* § 9604(c)(2) (requires consultation by President with affected states prior to determination of any appropriate remedial action); 42 *U.S.C.A.* § 9604(c)(3) (mandates a minimum level of state financial and technical (contract or cooperative agreement) participation as a prerequisite to receiving federal cleanup funds); 42 *U.S.C.A.* § 9604(d)(1) (encourages states with the capability to carry out cleanup actions to do so with reimbursement from Superfund); 42 *U.S.C.A.* § 9605(4) (requires adoption of National Contingency Plan setting forth, among other things, "appropriate roles and responsibilities for the Federal, State, and local government * * * in effectuating the plan"); and 42 *U.S.C.A.* § 9614(a) ("Nothing in this chapter shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substance within such State.") These provisions exemplify the intended interdependence between Superfund and state programs.

Courts frequently refer to events occurring immediately prior to the time of enactment as an extrinsic aid in fathoming legislative intent. *See* 2A *Sutherland Statutory Construction, supra,* at § 48.04. Of persuasive significance, therefore, is the colloquy between Senator Bradley of New Jersey and Senator Randolph of West Virginia that preceded the enactment of Superfund. Because Senator Randolph was the chairman of the Committee on Environment and Public Works, which reported the Superfund bill to the Senate, as well as floor manager and cosponsor of the measure, his explanations and comments with respect to the interpretation of Superfund provisions deserve particular deference. *See* 126 *Cong.Rec.* S14941–15008 (daily ed. Nov. 24, 1980); *see also F.E.A. v. Algonquin SNG, Inc.,* 426 *U.S.* 548, 564, 96 *S.Ct.* 2295, 2304, 49 *L.Ed.*2d 49, 60 (1976)

(relying on Senate floor debates for support in statutory construction, the Court pointed out that "as a statement of one of the legislation's sponsors, this explanation deserves to be accorded substantial weight in interpreting the statute"); *Brennan v. Corning Glass Works,* 480 *F.*2d 1254, 1260 (3d Cir.1973) (recognizing that "a sponsor's views are entitled to great weight"); 2A *Sutherland Statutory Construction, supra,* at § 48.15 (noting "reality of legislative practice" that legislators look to sponsors as sources of information corcerning a bill's purpose, meaning, and intended effect).

Senator Bradley set the tenor of his dialogue with Senator Randolph by expressing the following concerns and identifying the issues that their comments would attempt to clarify:

> New Jersey and several of the other States with successful State spill funds (including Michigan, Florida, California, Maryland, and New York) have on repeated occasions expressed grave concerns that the preemption language contained in this bill may work to slow down governmental response to spills of oils and hazardous wastes by creating questions as to the availability of State and [/]or Federal funds to provide operating, up front dollars to finance emergency cleanup and containment actions. I understand the concern debated over the years in conjunction with superfund that industry not be forced to suffer a double tax for the same functions carried out by different levels of government.
>
> * * * * * * * *
>
> Mr. President, in order to clarify the remaining questions concerning allowable State activity under this bill's preemption language, I wonder if the Senator [Randolph] from West Virginia would consent to a few questions on this issue? [126 *Cong.Rec.* S14981 (daily ed. Nov. 24, 1980).]

The colloquy that followed these introductory remarks leaves little doubt that section 114(c) was not intended as a total preemption of state involvement in hazardous-waste cleanup

efforts. First, the remarks of Senator Randolph lend strong support to that conclusion:

> [Mr. BRADLEY.] Am I correct in understanding that it is the purpose of this legislation to prohibit States from requiring any person to contribute to a fund for the purpose of reimbursing claims already provided for in this legislation?
>
> Mr. RANDOLPH. Yes, that is the clear intent. The purpose is to prohibit States from creating duplicate funds to pay damage compensable under this bill.
>
> Mr. BRADLEY. However, there is no such preemption of a State's ability to collect such taxes or fees for other costs associated with releases that are not compensable damages as defined in this legislation.
>
> Mr. RANDOLPH. The Senator is correct. [*Id.*]

Should any doubt remain, the following excerpts establish that the interrelationship between Superfund and state cleanup funds allows for state funds to fill in the gaps left by Superfund:

> Mr. RANDOLPH. * * * What this bill does is prohibit a State from requiring any person to contribute to any fund if the purpose of that fund is to compensate for a claim paid for under the provisions of this bill.
>
> * * * * * * * * *
>
> Putting it simply, this is a prohibition against double taxation for the same purposes. It is not a prohibition on the uses that a State may make of its money, nor does it prohibit a State from imposing fees or taxes for other purposes connected with cleanup or restoration activities such as the purchase of pollution abatement equipment or the hiring or training of personnel for pollution prevention programs.
>
> In summary, Mr. President, this preemption provision is narrow in scope and limited to the particular purpose of preventing double taxation.

Mr. BRADLEY. Am I correct in assuming that moneys expended by State funds can be used to provide the required 10 percent State match?

Mr. RANDOLPH. That is correct.

Mr. BRADLEY. And am I also correct in noting that State funds are preempted only for efforts which are in fact paid for by the Federal fund and that there would be no preemption for efforts which are eligible for Federal funds but for which there is no reimbursement?

Mr. RANDOLPH. That is correct.

Mr. BRADLEY. Finally, if the Federal Government determines that the needs at other sites require that Federal efforts be terminated at the first site before that site is completed, may a State fund complete the effort?

Mr. RANDOLPH. This legislation would permit that to happen. [*Id.*]

As the Tax Court noted, "[t]he Randolph interpretation, which would enable states to tax for remedial actions not actually compensated under super fund, comports with a prohibition against double taxation in that states are still prevented from taxing to pay for cleanups actually financed by the Federal Government." 4 *N.J.Tax* at 310.

This conclusion, that Superfund preempts state taxation only when the state fund thereby created is used to compensate cleanup activities already compensated by Superfund, finds support also in the recent comments of the House of Representatives Committee on Energy and Commerce. [8] In its Report dated

[8] In this connection we are reminded that "while the views of subsequent Congresses cannot override the unmistakable intent of the enacting one, * * * such views are entitled to significant weight * * * and particularly so when the precise intent of the enacting Congress is obscure." *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 *U.S.* 572, 596, 100 *S.Ct.* 800, 814, 63 *L.Ed*2d 36, 54 (1980) (citations omitted); *accord Bell v. New Jersey &*

July 16, 1984, the Committee on Energy and Commerce, to which H.R. 5640 ("Superfund Expansion and Protection Act of 1984") was referred, addressed Superfund's relationship to other law and, in particular, the pending bill's repeal of Superfund's preemption provision:

> The section repeals the provision of current law which preempts state taxing authority in certain circumstances. The Committee is aware that the current law's preemption of state taxing authority has been interpreted by some to constitute a total elimination of state authority in this area. *The Committee believes that the proper interpretation of current law is that its preemption provision was intended only to preclude states from imposing taxes or otherwise requiring contributions to funds which would pay costs or damages that would be actually compensated by Superfund.* To avoid any possible misinterpretation of the law which could further restrict the states' efforts to raise the funds necessary to meet their matching share obligations under the program, the legislation repeals the current law's

Pennsylvania, 461 *U.S.* 773,—, 103 *S.Ct.* 2187, 2194, 76 *L.Ed.*2d 312, 323, (1983) ("[T]he view of a later Congress does not establish definitively the meaning of an earlier enactment, but it does have persuasive value.") *Edwards v. Mayor and Council of Moonachie*, 3 *N.J.* 17, 24 (1949) ("[W]hile entitled to due consideration, the subsequent legislative construction of a statute is not conclusive of the significance of the prior act."). *But cf. Garden State Farms, Inc. v. Bay*, 77 *N.J.* 439, 453 (1978) ("We believe that '* * * caution must be exercised in using the action of the legislature on proposed amendments as an interpretative aid' in discerning legislative intent. 2A *Sutherland, Statutory Construction*, § 48.18 at 225 (Sands ed. 1973).").

On May 10, 1984, H.R. 5640 was referred jointly to the Committees on Energy and Commerce and Public Works and Transportation for a period ending not later than July 24, 1984, as well as to the Committee on Ways and Means. On August 10, 1984 the House of Representatives passed H.R. 5640. *See supra* note 6, at 531–532. Thus, although we realize that this legislation is pending senatorial and presidential approval, we find that the relevancy of the statements contained in the Committee report should not be overlooked.

> preemption provision in its entirety.[9] [*H.R.Rep.No.* 890, Part 1, 98th Cong., 2d Sess. 58-59 (1984) (footnote and emphasis added).]

Thus, not only does the colloquy between Senators Bradley and Randolph support the conclusion that total preemption was not intended, but Congress itself is now trying to clarify what it views as a misinterpretation of the enacting Congress' intent.

We note too that when enacted, Superfund was recognized by various members of Congress as providing for an insufficient funding level to tackle the cleanup and removal of hazardous-waste sites that existed at that time. *See* 4 *N.J.Tax* at 312–13. *See generally* 126 *Cong.Rec.* S15007 (daily ed. Nov. 24, 1980) (remarks of Sen. Stafford); *S.Rep.No.* 848, 96th Cong., 2d Sess. 17, 71 (1980); *H.R.Rep.No.* 1016, 96th Cong., 2d Sess. 20 (1980), *reprinted in* 1980 *U.S. Code Cong. & Ad. News* 6119, 6123. This feature—the inadequacy of Superfund to meet cleanup needs—empahsizes Congress' probable intent to allow states to continue their own efforts to assist in cleanup activities.

Another source of interpretive information is the comments made by the federal administrative agency charged with the authority to implement the statute in question. "It is a fundamental maxim that the opinion as to the construction of a regulatory statute of the expert administrative agency charged with the enforcement of that statute is entitled to great weight and is a 'substantial factor to be considered in construing the statute.' " *New Jersey Guild of Hearing Aid Dispensers v. Long,* 75 *N.J.* 544, 575 (1978) (citing *Youakim v. Miller,* 425 *U.S.*

[9] If enacted, section 118 of the legislation would amend section 114(c) of Superfund to read as follows:

> (c) Notwithstanding any provision of this or any other law, a State may require any person to contribute to any fund the purpose of which is to pay compensation for claims for any costs of response or damages which may be compensated under this Act. [*H.R.Rep.No.* 890, Part 1, 98th Cong., 2d Sess. 12 (1984).]

231, 235, 96 *S.Ct.* 1399, 1402, 47 *L.Ed.*2d 701, 706 (1976)). In this case that agency is the Environmental Protection Agency. In an Executive Summary memorandum, the Administrator of the EPA discussed the preemption issue and stated that section 114(c) of Superfund "does not apply to State funds which are used * * * : * * * To compensate damage claims and to remove or remedy releases of hazardous substances eligible to be financed by [Superfund] but for which no federal reimbursement is provided." *Office of Emergency and Remedial Response, U.S. Environmental Protection Agency, Guidance: Cooperative Agreements and Contracts with States Under the Compehensive Environmental Response, Compensation and Liability Act of 1980 (P.L. 96–510)* ix-x (March 1982). This interpretation is consistent with both the legislative history and with the broad remedial goals of Superfund.

In *San-Lan Builders, Inc. v. Baxendale, 28 N.J.* 148 (1958), this Court recognized the need to look to the general tenor of the law:

> [I]n this quest for the true intention of the law, the letter gives way to the obvious reason and spirit of the expression, and to this end the evident policy and purpose of the act constitute an implied limitation on the sense of general terms and a touchstone for the expansion of narrower terms. * * * Scholastic strictness is to be avoided in the search for the legislative intention. The particular terms are to be made responsive to the essential principle of the law. It is not the words but the internal sense of the act that controls. Reason is the soul of law. *Wright v. Vogt*, 7 *N.J.* 1 (1951). [*Id.* at 155.]

Thus, as Judge Evers reasoned,

> [i]f § 114(c) is read to preempt *all* state taxation for hazardous waste cleanups, the clause would undermine the salutary statutory goals of [Superfund] and would result in actually limiting the number of cleanups which could otherwise be initiated by the

state in spite of the fact that [Superfund] was intended to expand cleanup efforts. [4 *N.J. Tax* at 311 (emphasis added).]

In fact, the National Contingency Plan, prepared in accordance with section 105 of Superfund, 42 *U.S.C.A.* § 9605, provides for the listing of "at least four hundred of the highest priority facilities". 42 *U.S.C.A.* § 9605(8)(B).[10] However, the National Contingency Plan also recognizes the inability of Superfund to compensate all sites and therefore requires "criteria for determining priorities among releases or threatened releases throughout the United States for the purpose of taking remedial action * * *." 42 *U.S.C.A.* § 9605(8)(A). Thus, some sites in need will not make the priority list and will therefore not be eligible for Superfund compensation. *See* 40 *C.F.R.* § 300.68(a). Hence, there will no doubt be sites that are excluded from the section 114(c) test of "may be compensated under this subchapter." 42 *U.S.C.A.* § 9614(c); *see also* 4 *N.J. Tax* at 312 n.9 (stating that at that time only twelve of New Jersey's 235 sites were qualified for priority treatment). Given the national interest in cleaning up and removing hazardous waste from our environment, we would be hard pressed to interpret the legislation as prohibiting states from supplementing the federal movement to combat this problem. As the Tax Court stated, "[i]t simply strains credulity to say that hazardous waste sites or spills not meeting the [priority list] criteria are claims which 'may be compensated' under [Superfund]." 4 *N.J.Tax* at 313.

[10] 42 *U.S.C.A.* § 9605(8)(B) provides that the President shall list national priorities among known or threatened releases throughout the United States and shall revise the list "no less often than annually." In performing this function the President "shall consider any priorities established by the States."

III

[5] The Tax Court emphasized that the underlying scheme of Superfund is one that "allows, but does not require, cooperation of the federal and state regimes." *Id.* at 315. A thorough understanding of this cooperative relationship leads us to the natural conclusion that section 114(c) of Superfund does not preempt Spill Fund in respect of funds that are used to compensate hazardous-waste cleanup costs and claims not covered or not in fact compensated by Superfund moneys. While we are mindful of "the obvious limitation that a double tax could not be collected and expended on any one project," *id.* at 320, we have no doubt that Congress' enactment of Superfund was aimed at providing a federal framework to supervise the revitalization of our environment. Surely Congress did not intend for the states just to sit back and wait for hazardous-waste compensation that might never be awarded.

The more logical conclusion, based particularly on the legislative history surrounding the enactment of Superfund, is that Congress contemplated that the federal government would attempt to deal with the problems of the most seriously affected sites (those listed in accordance with the National Priority Plan) and to allow states to maintain a compensation fund, or to use general revenues should they choose, to conduct their own cleanup efforts on those sites not receiving Superfund compensation and to provide for their cooperative program components including their 10% share of cleanup costs, related administrative costs for equipment and personnel, and other program features not covered by Superfund such as containment and indemnity.

We therefore hold that the Spill Fund tax imposed on plaintiffs is not preempted by section 114(c) of Superfund insofar as Spill Fund is used to compensate hazardous-waste cleanup costs and related claims that are either not covered or not actually paid under Superfund. The underlying intent of Superfund, as well as the legislative history, mandates a conclusion of no preemption.

Affirmed.

For affirmance—Chief Justice WILENTZ, Justices CLIFFORD, SCHREIBER, HANDLER and POLLOCK, and Judge FRITZ—5.

For reversal—None.

EXXON CORPORATION, ET AL., PLAINTIFFS-APPELLANTS, v. ROBERT HUNT, ADMINISTRATOR OF N.J. SPILL COMPENSATION FUND, ET AL., DEFENDANTS-RESPONDENTS.

and

EXXON CORPORATION, ET AL., PLAINTIFFS-APPELLANTS, v. ROBERT HUNT, ADMINISTRATOR OF N.J. SPILL COMPENSATION FUND, ET AL., DEFENDANTS-RESPONDENTS.

EXXON CORPORATION, ET AL., APPELLANTS, v. KENNETH R. BIEDERMAN, TREASURER OF THE STATE OF N.J., AND THE N.J. DEPARTMENT OF THE TREASURY, RESPONDENTS.

Superior Court of New Jersey
Appellate Division

Argued May 17, 1983—Decided June 22, 1983.

SYNOPSIS

Appeals were taken challenging a declaratory judgment of the Tax Court, 4 N.J. Tax 294, determining the extent to which the taxing provisions of the New Jersey Spill Fund and Compensation Act are preempted by federal law and the validity of certain regulations promulgated by the State Treasurer under the Spill Fund Act. The Superior Court, Appellate Division, Antell, J.A.D., held that failure to comply with clearly stated requirements of Administrative Procedure Act rendered regulations promulgated by the State Treasurer invalid.

Affirmed.

Matthews, P.J.A.D., filed a concurring opinion.

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1. Health and Environment ⇐25.7(23)

Adoption of regulations governing expenditures under New Jersey Spill Fund and Compensation Act, after erroneously treating plaintiffs' hand-delivered written comments as untimely, did not comply with Administrative Procedure Act and thus regulations were invalid, despite Department of Treasury's contention that it had "become familiar" with plaintiffs' position before proposing regulations. N.J.S.A. 52:14B–1 et seq., 52:14B–4(a)(1), (d), 58:10–23.11t.

2. Administrative Law and Procedure ⇐395

Substantial compliance with Administrative Procedure Act cannot be found where prescribed system of notice and written comments has been sidestepped. N.J.S.A. 52:14B–1 et seq.

Before Judges MATTHEWS, ANTELL and FRANCIS.

John J. Carlin, Jr., argued the cause for appellants, (*Farrell, Curtis, Carlin & Davidson,* attorneys; *John J. Carlin* and *Lisa J. Pollack* on the brief).

Mary C. Jacobson, Deputy Attorney General, argued the cause for respondents (*Irwin I. Kimmelman,* Attorney General of New Jersey, attorney; *Michael R. Cole,* Assistant Attorney General, of counsel and *Mary C. Jacobson* on the brief).

The majority opinion of the court was delivered by

ANTELL, J.A.D.

These are consolidated appeals challenging (1) a declaratory judgment of the Tax Court determining the extent to which the taxing provisions of the New Jersey Spill Fund and Compensation Act, *N.J.S.A.* 58:10–23.11h are preempted by section 114(c) [1] of the Federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund), 42 *U.S.C.A.* § 9601 *et seq.* and (2) the validity of certain regulations promulgated by the State Treasurer under the Spill Fund Act. We affirm the judgment of the Tax Court substantially for the reasons stated by Judge Evers in his written opinion published at 4 *N.J. Tax* 294 (Tax Ct. 1982).

Pursuant to *N.J.S.A.* 58:10–23.11t the State Treasurer and the spill fund director are authorized to adopt such rules and regulations pursuant to the Administrative Procedure Act as they may deem necessary to accomplish their purposes and responsibilities under the Spill Fund Act. *N.J.S.A.* 52:14B–4(a)(1) of the Administrative Procedure Act requires the agency to give 30 days public notice prior to the adoption, amendment or repeal of any rule. Subsection (3) requires the agency to

> Afford all interested persons reasonable opportunity to submit data, views, or arguments, orally or in writing. The agency shall consider fully all written and oral submissions respecting the proposed rule.

[1] On January 4, 1982 the Department of Treasury published its proposed regulations governing expenditures under the Act in the New Jersey Register, 14 *N.J.R.* 36, inviting interested parties to submit their comments on or before February 13, 1982. Plaintiffs hand delivered their written comments on February 11, 1982, but the department erroneously determined that they were "untimely and need not be considered," and on March

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[1] 42 *U.S.C.A.* § 9614(c)

15, 1982 published a Notice of Adoption of the Regulations in the New Jersey Register, 14 *N.J.R.* 285. On March 29, 1982 plaintiffs submitted their written request that the department correct its error by rescinding its regulations and re-proposing them with provision for a "meaningful comment period." Their request was denied by letter from the Assistant State Treasurer dated April 7, 1982.

The State's position with respect to this issue is that the omission was only "a technical error which does not justify the invalidation of the regulations." It points out that although plaintiffs' comments were treated as untimely received for purposes of entitlement to consideration before adoption of the regulations the Department had nevertheless "become familiar" with plaintiffs' position before proposing the regulations. Relying upon *N.J.S.A.* 52:14B–4(d), it maintains that the validity of the regulations should be sustained on the basis of its "substantial compliance" with the provisions of the Administrative Procedure Act.

[2] The explanations offered by the State fail to justify its non-compliance with the clearly stated requirements of the Administrative Procedure Act. Although its disregard of the Act is not as complete as that considered in *Glaser v. Downes,* 126 *N.J. Super.* 10 (App. Div. 1973), certif. den. 64 *N.J.* 573 (1974), the denial of due process of law resulting to plaintiffs is no less. Substantial compliance with the Administrative Procedure Act cannot be found where the prescribed system of notice and written comments, called "the mainstay of modern rulemaking procedure," *Davis, Administrative Law of the Seventies,* at 169 (1976), has been sidestepped.

We conclude that the regulations under review adopted by notice published March 15, 1982 are invalid and without force and effect.

MATTHEWS, P.J.A.D. (concurring).

I agree with the conclusion reached by Judge Evers in the Tax Court which we now affirm. I also agree that plaintiffs were denied due process of law in the rule-making process. I am constrained to file this concurring opinion, however, because there appears to be a general assumption in the majority opinion that the Congress could preempt New Jersey's taxation provision if it so intended. I think that such an assumption is erroneous.

The Supremacy Clause of the United States Constitution provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . . [*U.S. Const.*, Art. VI, cl. 2]

I question whether a statute passed by Congress which denies to the states the right to tax for the purposes of the Spill Fund is "made in Pursuance" of the Constitution. A state may not tax imports or exports, federal property, or interstate commerce discriminatorily, or in any fashion that could obstruct a legitimate exercise of Congressional power. Beyond those limitations, the states have broad powers to structure revenue raising taxes as they see fit. As Judge Evers found, "plaintiffs neither raised nor attempted to support any argument that the taxing provisions of spill fund were violative of any other constitutional rights." 4 *N.J. Tax* at 316. He also noted that "plaintiffs do not suggest that there is an actual conflict between the limited purposes of super fund and the overall policy enunciated by New Jersey in spill fund." *Id.* Plaintiffs do not contest these statements on appeal. Thus, the underlying premise of both plaintiffs' argument here and of Judge Evers' opinion is that if Congress implicitly or explicitly intended to preclude the states from taxing for any purpose which is otherwise constitutional it has the power to do so under the Supremacy Clause.

The most basic premise of our constitutional form of government is that in the Constitution the sovereign states relinquished certain of their sovereign powers to the federal government for its exclusive exercise. *See Goldstein v. California,* 412 *U.S.* 546, 552, 93 *S. Ct.* 2303, 2307, 37 *L.Ed.*2d 163, reh. den. 414 *U.S.* 883, 94 *S.Ct.* 27, 38 *L.Ed.*2d 131 (1973). "But . . . the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States." *Id.* 412 *U.S.* at 552–553, 93 *S.Ct.* at 2308, quoting from Number 32 of *The Federalist* by Alexander Hamilton (emphasis in original).[1] Hamilton went on to specify the three instances when state sovereignty would be deemed alienated: ". . . where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority, and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*." *Id.;* emphasis in original.

[1] *E.g.*, the first paragraph of *The Federalist* 32 reads:

> Although I am of opinion that there would be no real danger of the consequences which seem to be apprehended to the State governments from a power in the Union to control them in the levies of money, because I am persuaded that the sense of the people, the extreme hazard of provoking the resentments of the State governments, and a conviction of the utility and necessity of local administrations for local purposes, would be a complete barrier against the oppressive use of such a power; yet I am willing here to allow, in its full extent, the justness of the reasoning which requires that the individual States should possess an independent and uncontrollable authority to raise their own revenues for the supply by their own wants. And making this concession, I affirm that (with the sole exception of duties on imports and exports) they would, under the plan of the convention, retain that authority in the most absolute and unqualified sense; and that an attempt on the part of the national government to abridge them in the exercise of it, would be a violent assumption of power, unwarranted by any article or clause of its Constitution.

As in *Jones v. Rath Packing Co.,* 430 *U.S.* 519, 524–525, 97 *S.Ct.* 1305, 1309, 51 *L.Ed.*2d 604, reh. den. 431 *U.S.* 925, 97 *S.Ct.* 2201, 53 *L.Ed.*2d 240 (1977), this case "contains no claim that the Constitution alone denies [New Jersey] power to enact the challenged provisions." In fact "the breadth of concurrent taxing powers of state and nation" have long been recognized. *Hines v. Davidowitz,* 312 *U.S.* 52, 68, n. 21, 61 *S.Ct.* 399, 404, n. 21, 85 *L.Ed.* 581 (1940), citing No. 32, *The Federalist.* Over one hundred years ago the Court found "nothing in the Constitution which contemplates or authorizes any direct abridgement of [the concurrent powers to tax] by national legislation." *Lane County v. Oregon,* 7 *Wall.* 71, 74 *U.S.* 71, 77, 19 *L.Ed.* 101, 105 (1868). "The extent to which [a State's power to tax] shall be exercised, the subjects upon which it shall be exercised, and the mode in which it shall be exercised, are all equally within the discretion of the Legislatures to which the States commit the exercise of the power." *Id.* The only limits to a State's power to tax outside of those explicitly stated in the Constitution is that a tax "must not be used as to burden or embarrass the operations of the National Government." *Id.*

The idea that a state has "the freedom of a sovereign both as to objects and methods" of taxation has been frequently repeated. *Shaffer v. Carter,* 252 *U.S.* 37, 51–52, 40 *S.Ct.* 221, 225, 64 *L.Ed.* 445 (1919), quoting *Michigan C.R. Co. v. Powers,* 201 *U.S.* 245, 292, 26 *S.Ct.* 459, 462, 50 *L.Ed.* 744 (1906). This freedom extends without interference "even if the effect . . . is akin to double taxation . . . since it is settled that nothing in [the Federal Constitution] or in the 14th [*sic*] Amendment prevents the states from imposing double taxation." 252 *U.S.* at 58, 40 *S.Ct.* at 227. As long as there is "some adequate or reasonable basis" for the taxation classifications double taxation is not forbidden. *Swiss Oil Corp. v. Shanks,* 273 *U.S.* 407, 413, 47 *S.Ct.* 393, 395, 71 *L.Ed.* 709 (1926).

Close federal supervision of states' taxing power would be "intolerable" and "hostile to the basic principles of our Government. . . ." *Allied Stores of Ohio v. Bowers,* 358 *U.S.* 522, 527, 79 *S.Ct.* 437,441,3 *L.Ed.*2d 480 (1959), quoting *Ohio Oil Co. v. Conway,* 281 *U.S.* 146, 159, 50 *S.Ct.* 310, 314, 74 *L.Ed.* 775 (1929). Some limits to a state's power to tax are found in the Equal Protection Clause, but "that clause imposes no iron rule of equality," 358 *U.S.* at 526, 79 *S.Ct.* at 440. The tax must have a rational basis and may not be "palpably arbitrary." Id. at 527, 79 *S.Ct.* at 441. It is also well established that the Supremacy Clause prohibits states from taxing the United States or its property directly. *Washington v. United States,* ——*U.S.*——, ——, 103, *S.Ct. 1344, 1348, 75 L.Ed.*2d 264, 268 (1983). But even that prohibition has been very narrowly construed and "the States' power to tax can be denied only under 'the clearest constitutional mandate,'" *Id.* at ——, 103 *S.Ct.* at 1351, 75 *L.Ed.*2d at 273, quoting *Michelin Tire Corp. v. Wages,* 423 *U.S.* 276, 293, 96 *S.Ct.* 535, 544, 46 *L.Ed.*2d 495 (1976), as cited in *United States v. New Mexico,* 455, *U.S.* 720, 737–738, 102 *S.Ct.* 1373, 1384, 71 *L.Ed.*2d 580 (1982). State taxes which affect interstate commerce must have a reasonable nexus between the taxing state and activities being taxed and must not discriminate against interstate commerce in favor of intrastate commerce or unduly infringe upon Congress' right to regulate interstate commerce. *See* generally, *Tribe, American Constitutional Law,* § 6–14, 15. The Constitution explicitly prohibits states from laying "any Imposts or Duties on Imports or Exports. . . ." *U.S. Const.,* Art. I, § 10, cl. 2. *See also Michelin Tire Corp. v. Wages, supra,* 423 *U.S.* 276, 96 *S.Ct.* 535, 46 *L.Ed.*2d 495.

Plaintiffs in this case make no allegations that the State has transgressed any of these limits on its spill fund tax. Their argument is based on an interpretation that § 114(c) of the Superfund precludes states from taxing for the same purpose as

the Superfund. In light of the strong history of the states' freedom as to the "modes and subjects" of their taxation schemes, and the Supreme Court's approval of double taxation, there must be some demonstration that New Jersey's tax somehow stands as an obstacle to the accomplishment of any of the permissible goals of the Superfund. I know of no authority which would permit Congress to prohibit a state from imposing an otherwise constitutional tax simply because it had determined that the taxpayer should not be taxed by both the federal and state governments. Presumably Congress could impose such a prohibition if it determined the state tax unduly interfered with its regulation of interstate commerce but, again, no such allegations have been presented here. The Supreme Court has admonished and repeated "[w]e must also be careful to distinguish those situations in which the concurrent exercise of a power by the Federal Government and the States or by the States alone *may possibly* lead to conflicts and those situations where conflicts *will necessarily* arise." *Goldstein v. California,* 412 *U.S.* at 554, 93 *S.Ct.* at 2309. No allegation of any conflict has been made.

The Supreme Court has stated in numerous cases that when the federal government has not been given exclusive control over a given matter "[c]onsideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana,* 451 *U.S.* 725, 746, 101 *S.Ct.* 2114, 2129, 68 *L.Ed.*2d 576 (1981). Certainly there should be no finding that congressional action precludes the states from exercising their powers to tax without some clear indication that Congress has a constitutional basis for so doing.

We should bear in mind that private parties have chosen to litigate this issue. This case does not represent a direct conflict between state and federal authorities. Perhaps the issue would be better framed as "Does New Jersey have the power to impose the Spill Fund Tax on these plaintiffs?" Such a reformulation

recognizes that this case clearly is one arising under the state law. It also emphasizes that this is a matter betweeen the private plaintiffs and the State of New Jersey. As Exxon has attempted to structure its arguments, it is attempting to assert a power of the federal government which that government may or may not even believe it possesses.

EXXON CORPORATION, THE B.F. GOODRICH COMPANY, UNION CARBIDE CORPORATION, MONSANTO COMPANY AND TENNECO CHEMICALS, INC., PLAINTIFFS, v. ROBERT HUNT, ADMINISTRATOR OF NEW JERSEY SPILL COMPENSATION FUND; CLIFFORD A. GOLDMAN, TREASURER OF THE STATE OF NEW JERSEY; SIDNEY GLASER, DIRECTOR OF THE DIVISION OF TAXATION; AND THE STATE OF NEW JERSEY, DEFENDANTS.

EXXON CORPORATION, THE B.F. GOODRICH COMPANY, UNION CARBIDE CORPORATION, MONSANTO COMPANY AND TENNECO CHEMICALS, INC., PLAINTIFFS, v. ROBERT HUNT, ADMINISTRATOR OF NEW JERSEY SPILL COMPENSATION FUND; CLIFFORD A. GOLDMAN, TREASURER OF THE STATE OF NEW JERSEY; SIDNEY GLASER, DIRECTOR OF THE DIVISION OF TAXATION; JERRY F. ENGLISH, COMMISSIONER OF ENVIRONMENTAL PROTECTION; AND THE STATE OF NEW JERSEY, DEFENDANTS.

Tax Court of New Jersey

April 23, 1982.

SYNOPSIS

In a case involving constitutionality of state Spill Compensation and Control Act, the Tax Court, Evers, J. T. C., on cross motions for summary judgment, held that such state statute has not been preempted by the federal Comprehensive Environmental Response, Compensation and Liability Act of 1980.

Plaintiffs' motion denied, and defendants' motion granted.

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1. States ⇦4.13

Where state statute conflicts with federal statute which has preempted field and stands as obstacle to accomplishment and execution of full purposes and objectives of Congress, supremacy clause of United States Constitution mandates that state statute fail. U.S.C.A.Const.Art. 6, cl. 2; Comprehensive Environmental Response, Compensation, and Liability Act of 1980, §§ 104(d)(1), 105, 111(f), 112, 114(a), 42 U.S.C.A. §§ 9604(d)(1), 9605, 9611(f), 9612, 9614(a).

2. States ⇦4.13

Where Congress has not foreclosed field, state statute is nevertheless void to the extent of actual conflict with federal statute. U.S.C.A.Const.Art. 6, cl. 2.

3. States ⇦4.13

Court must attempt to harmonize state and federal laws whenever possible, particularly in areas traditionally reserved to states and relating to vital interests of state citizens. N.J.S.A. 58:10–23.11 et seq.; Comprehensive Environmental Response, Compensation, and Liability Act of 1980, §§ 101 et seq., 114(c), 42 U.S.C.A. §§ 9601 et seq., 9614(c); U.S.C.A.Const.Art. 6, cl. 2.

4. Health and Environment ⇦25.7(3)

Section of Comprehensive Environmental Response, Compensation and Liability Act of 1980 providing that no person may be required to "contribute to any fund, purpose of which is to pay compensation for claims for any costs of response for damages or claims which may be compensated under this title" is ambiguous, and court must look to extrinsic aids to clarify

legislative scheme, and inquiry requires consideration of relationship between federal and state laws as they ought to be applied, and not merely as written. N.J.S.A. 58:10–23.11 et seq.; Comprehensive Environmental Response, Compensation, and Liability Act of 1980, §§ 101 et seq., 114(b, c), 42 U.S.C.A. §§ 9601 et seq., 9614(b, c); U.S.C.A.Const.Art. 6, cl. 2.

5. Statutes ⇦217.4

No rule of statutory construction should be permitted to block consideration of any legislative history which could be of aid to court where statutory language is ambiguous or where literal interpretation would thwart overall statutory scheme.

6. States ⇦4.10

Section of Comprehensive Environmental Response, Compensation and Liability Act providing that no person "may be required to contribute to any fund, the purpose of which is to pay compensation for claims for any costs of response or damages or claims which may be compensated under this title" is not really preemption clause as term is classically used, and, in addressing "taxing" and not "participation," does not preempt field from state participation. Comprehensive Environmental Response, Compensation and Liability Act of 1980, § 114(b, c), 42 U.S.C.A. § 9614(b, c).

7. Taxation ⇦24

Under Comprehensive Environmental Response, Compensation and Liability Act of 1980, state can tax local industries to support fund dedicated to purpose of compensation claims and costs not actually paid by super fund. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, §§ 104, 104(c)(2, 3), 111, 112, 114(c), 221, 42 U.S.C.A. §§ 9604, 9604(c)(2, 3), 9611, 9612, 9614(c), 9631; §§ 201, 211, 94 Stat. 2767; 28 U.S.C.A. § 1341; R. 4:46–1; R. 4:46–2;

R. 8:7(a); N.J.S.A. 58:10–23.11f, 58:10–23.11h, 58:10–23i, 58:10–23.11*o*; 26 U.S.C.A. § 4611 et seq.

8. Taxation ⇦24

Under Comprehensive Environmental Response, Compensation and Liability Act of 1980, spill fund, as presently constituted, does protect industry from any threat that New Jersey would stockpile spill tax revenues. N.J.S.A. 58:10–23.11h, subd. b.

9. States ⇦4.10

With respect to dependency, Congress, in adoption of super fund, implicitly acknowledged that direct state action is necessary to assure adequate response action to spills. Comprehensive Environmental Response, Compensation and Liability Act of 1980, §§ 104(c)(2, 3), (d)(1), 111(f), 112, 114(a), 42 U.S.C.A. §§ 9604(c)(2, 3), (d)(1), 9611(f), 9612, 9614(a).

10. States ⇦4.19

Congressional scheme of super fund is one which allows, but does not require, cooperation of federal and state regimes. Comprehensive Environmental Response, Compensation and Liability Act of 1980, §§ 105, 105(8)(A, B), 114(c), 42 U.S.C.A. §§ 9605, 9605(8)(A, B), 9614(c).

11. Taxation ⇦24

Under Comprehensive Environmental Response, Compensation and Liability Act section explicitly exempting state tax on petrochemical industries in order to finance purchase of hazardous response equipment, prepositioning of such response equipment and other preparations for response to release of hazardous substances, spill fund tax is valid insofar as such monies are used to satisfy such purposes. N.J.S.A. 58:10–23.11*o*(4); Comprehen-

sive Environmental Response, Compensation and Liability Act of 1980, §§ 101, 114(c), 42 U.S.C.A. §§ 9601, 9614(c).

12. States ⇦4.10

Claims for direct and indirect damages caused by discharge of hazardous substances are within scope of proper spill fund spending under Comprehensive Environmental Response, Compensation and Liability Act explicitly exempting from its provisions state tax on petrochemical industries in order to finance certain measures, and spill fund tax may also be collected and used to pay for petroleum spills, income or property value losses caused by damage resulting from discharge of hazardous substances and cost of restoration or replacement of natural resources damaged or destroyed by discharge. N.J.S.A. 58:10–23.-11b, subd. k, 58:10–23.11g, subds. a, a(1); Comprehensive Environmental Response, Compensation and Liability Act of 1980, §§ 104(c)(3), 107(a)(4)(A), (f), 111(c)(2), (d)(1), 114(c), 42 U.S.C.A. §§ 9604(c)(3), 9607(a)(4)(A), (f), 9611(c)(2), (d)(1), 9614(c).

13. States ⇦4.10

State fund administrative expenses and administrative costs relating to petroleum spills, reimbursement of third-party damage claims and other claims not compensable under Comprehensive Environmental Response, Compensation and Liability Act of 1980 are proper objects of spill fund spending, and same is true of state's contribution of ten percent of more of costs of remedial action to qualify for federal funding and financing of remedial activities on temporary basis pending super fund reimbursement. N.J.S.A. 58:10–23.11b, subd. k, 58:10–23.11g, subds. a, a(1); Comprehensive Environmental Response, Compensation and Liability Act of 1980, §§ 104(c)(3), 107(a)(4)(A), (f), 111(c)(2), (d)(1), 114(c), 42 U.S.C.A. §§ 9604(c)(3), 9607(a)(4)(A), (f), 9611(c)(2), (d)(1), 9614(c).

14. States ⇦4.10

Legislature envisioned that spill act would be enforced in conjunction with federal law and with any other applicable law, and even if federal legislation could be construed to preempt part of spill fund, nonpreempted areas would sustain its continued validity. N.J.S.A. 58:10–23.11a, 58:10–23.11v, 58:10–23.11w, 58:10–23.11z; Comprehensive Environmental Response, Compensation and Liability Act of 1980, § 114(c), 42 U.S.C.A. § 9614(c).

John J. Carlin, Jr., for plaintiffs *(Farrell, Curtis, Carlin & Davidson, attorneys).*

Mary C. Jacobson, for defendant *(Irwin I. Kimmelman,* Attorney General of New Jersey, attorney); *Michael Cole & Herbert Glickman,* of counsel.

EVERS, J. T. C.

The issue presented on cross-motions for summary judgment involves the constitutionality of the New Jersey Spill Compensation And Control (spill fund) Act, *N.J.S.A.* 58:10–23.11 *et seq.* Its resolution requires a determination of whether that statute has been preempted by § 114(c) [1] of the Comprehensive Environmental Response, Compensation and Liability (super fund) Act of 1980, *P. L.* 96–510, 94 *Stat.* 2767, codified as 42 *U.S.C.A.* § 9601 *et seq.*, in which event it must fall, as mandated by the Supremacy Clause of the United States Constitution. [2]

[1] 42*U.S.C.* § 9614(c).

[2] The United States Constitution, Art. VI, cl. 2, provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every

For the reasons hereafter set forth plaintiffs' motion is denied and defendants' motion is granted. [3]

Plaintiffs also seek a return of all monies paid to New Jersey pursuant to the spill fund since December 11, 1980, the effective date of super fund. [4] Purely legal questions are presented which make the action appropriate for summary judgment. *Tyson v. Groze,* 172 *N.J.Super.* 314, 319, 411 *A.*2d 1170 (App.Div.1980); *Felbrant v. Able,* 80 *N.J.Super.* 587, 590, 194

State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

[3] Portions of an action instituted by plaintiffs in the Superior Court of New Jersey, Chancery Division—Mercer County (Docket C 4530–80) which was transferred to the Tax Court (Docket SC 319A–81 TC) and consolidated herewith, survive this motion.

[4] A similar action, brought by plaintiffs in the United States District Court for the District of New Jersey, Civil Action 71–1458M, was dismissed on the basis that the Tax Anti-injunction Act, 28 *U.S.C.A.* § 1341, compelled that the matter be determined in a state court. Plaintiffs have appealed that decision to the United States Court of Appeals for the Third Circuit (No. 81–2514). The preemption issue was also raised by the State in a declaratory judgment action brought against the United States (*State of New Jersey et al. v. United States of America et al.*, United States District Court for the District of Columbia, Civil Action No. 81–0945), by which a definitive interpretation of the scope and meaning of the preemption clause of super fund was sought. That action did not involve a review of the New Jersey taxing scheme pursuant to the spill act. It was dismissed. Similar declaratory judgment actions were brought in *Lesniak et al. v. United States of America et al.* (No. 81–977) and *Merlino et al. v. United States of America et al.* (No. 81–1914) in the United States District Court for the District of New Jersey. These matters were settled by stipulation. The State's motion to make the provisions of those settlements part of the record of this controversy for consideration by the court was denied by separate opinion. Lastly, in *State of New Jersey et al. v. Gorsuch et al.*, United States District Court for the District of Columbia, Civil Action No. 81–2269 the court entered an order directing the Environmental Protection Association to have a "National Contingency Plan" in place by May 11, 1982.

During the pendency of this action plaintiffs have continued to pay the spill fund tax according to its terms.

*A.*2d 491 (App.Div.1963). *See, also, Judson v. Peoples Bank and Trust Co. of Westfield,* 17 *N.J.* 67, 110 *A.*2d 24 (1954); *R.* 8:7(a); *R.* 4:46–1; *R.* 4:46–2.

Section 114(c) of super fund states:

> Except as provided in this Act, no person may be required to contribute to any fund, the purpose of which is to pay compensation for claims for any costs of response or damages or claims which may be compensated under this title. Nothing in this section shall preclude any State from using general revenues for such a fund, or from imposing a tax or fee upon any persons or upon any substance in order to finance the purchase or prepositioning of hazardous substance response equipment or other preparations for the response to a release of hazardous substances which affects such State.

Plaintiffs, five major corporations whose operations involve the use of recognized hazardous substances, including petroleum, are taxed under both acts. On the basis that both acts have as their principal purposes the payment of claims and costs relating to the cleanup, removal and containment of hazardous substance spills, plaintiffs interpret this provision as precluding New Jersey from collecting any tax that is earmarked for such purposes. Plaintiffs seemingly argue that New Jersey can only gain the use of industry tax monies for cleanup purposes by requesting and obtaining Federal Government participation in a specific project. In the event Federal Government participation is withheld, only general revenues are available for state action, according to plaintiffs. Any areas which may be compensated under spill fund but which may not be compensated under super fund are peripheral, according to plaintiffs, and are so insignificant as to be unable to sustain the state tax. Accordingly, plaintiffs contend that the entire state act must be nullified.

Defendants deny that the spill fund tax is preempted unless there is a precise coincidence of tax money expenditures. In its

more narrow interpretation the State contends that only those spill fund tax monies which are used for identical purposes and which are actually covered by super fund expenditures can be preempted. Furthermore, defendants contend that the statutory scheme designed by Congress in super fund emphasizes the need for a combined federal and state response to toxic contamination. Super fund, according to defendants, provides a framework for a cooperative federalism in which the Federal Government would work with the states to effectuate the broad statutory goals of protecting the citizens and the environment of the country from the deleterious effects of pollution caused by hazardous substances. In short, it is defendants' position that not only can super fund and spill fund, as presently constituted, co-exist but that they are intended to co-exist. Alternatively, the State argues that, if preemption does exist, it is not total and the taxes collected as to the non-preempted areas are permissible. In order to place these contentions in proper perspective a review of the purposes and pertinent provisions of both statutes is necessary.

Spill fund, which become effective in 1977, in its general terms prohibits the discharge of petroleum and other hazardous substances in the State of New Jersey. Pertinent to this controversy are its specific provisions which provide for the removal and cleanup of such discharges, *N.J.S.A.* 58:10–23.11f, the establishment of a spill compensation fund, *N.J.S.A.* 58:10–23.11i, and the raising of revenue therefor pursuant to *N.J.S.A.* 58:10–23.11h, which states: "There is hereby levied upon each owner or operator of one or more major facilities a tax to insure compensation for cleanup costs and damages associated with any discharge of hazardous substances to be paid by the transferee. . . ." [5] The administrator of the fund is directed,

[5] That each plaintiff is a major facility as defined in the spill fund act is not disputed.

pursuant to *N.J.S.A.* 58:10–23.11*o*, to disburse monies from the fund for the following purposes:

1. All costs incurred by the State in connection with the removal and cleanup of hazardous substance discharges.

2. All direct and indirect damages no matter by whom sustained, including but not limited to:

a. The cost of restoring, repairing or replacing any real or personal property damaged or destroyed by a discharge; any income lost as a result of damage to or destruction of such property; any reduction in value of such property as a result thereof.

b. The cost of restoration and replacement of damaged or destroyed natural resources.

c. Loss of income or impairment of earning capacity due to damage to real or personal property.

d. Loss of tax revenues by the state or local governments resulting from damage to such property for a period of one year.

e. Interest on loans obtained or other obligations incurred by a claimant for the purpose of ameliorating the effects of a discharge pending payment of the claim.

N.J.S.A. 58:10–23.11*o* also provides for the disbursement of sums, as may be appropriated by the Legislature, for research on the prevention and effects of spills, for the development of improved cleanup and removal operations, for demonstration programs and for administration, personnel and equipment costs. [6]

[6] While it may not be an eligible cost under the spill fund act as presently constituted, it is apparent that super fund contemplated that seed money, including at least a 10% matching fund, will be contributed by those states which seek to qualify for federal funding.

During the latter 1970s the Congress undertook the task of developing a program to deal with national hazardous waste problems. At one point in its deliberations Congress debated establishing a fund of $4.1 billion for that purpose. On December 11, 1980 these federal legislative efforts culminated in the enactment of super fund which provides $1.6 billion over a five-year period for the cleanup and removal of pollution caused by the release of hazardous substances into the environment. To finance this program Congress levied a tax against the chemical and petroleum industries designed to provide 87.5% of the funds needed to support the federally-approved cleanup efforts. The remaining 12.5% is supplied through general federal revenues. §§ 111, 112, 201, 211 and 221.

Section 104 of super fund provides generally that whenever there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to remove or arrange for the removal of, and to provide for remedial action relating to such hazardous substance, pollutant or contaminant. Section 211 provides for the amendment of chapter 38 of the Internal Revenue Code to impose a tax on crude oil and petroleum products and on certain chemicals. This amendment became effective April 1, 1981. Pursuant to § 111 of super fund the President is authorized to use the money in the fund for, among other things, payment of costs of government response to hazardous waste discharges and costs incurred in compensating certain losses resulting from such discharges.

Recognizing that some states had already occupied the field and, in an implicit acknowledgement that such state involvement was necessary to assure more complete responsive action to hazardous waste spills, Congress provided in § 104(c)(2) that the Federal Government must consult with an affected state before

determining appropriate remedial action. And, in § 104(c)(3), Congress mandated a minimum level of state participation as a prerequisite to receiving federal funds. To qualify for federal cleanup dollars states must formally guarantee, by contract or cooperative agreement, to provide (1) all future maintenance of removal and remedial actions; (2) the availability of a hazardous waste disposal facility for the off-site storage or treatment of hazardous substances, and (3) payment of 10% or more of the total cost of remedial operations. The state share of cleanup expenses can escalate to 50% or more if the site of the release is owned by the state itself or a political subdivision thereof. *Id.* Moreover, § 104(d)(1) encourages states to become official response authorities when they can demonstrate that they have the technical capability necessary to effect the purposes of the act. Under this section states undertake the initiation and upfront financing of remedial work and then apply to super fund for reimbursement of "reasonable response costs." *Id.* See, also, § 105 (directs the Federal Government to adopt a National Contingency Plan setting forth federal and state responsibilities under super fund and establishing criteria for determining priorities [with state input] among hazardous substance releases throughout the United States); § 111(f) (Federal Government permitted to delegate authority to state officials to obligate super fund monies where a state has replaced the Federal Government as a response authority); § 112 (Federal Government authorized to use state agencies to implement super fund claims procedure), and § 114(a) (states permitted to impose any liability in addition to that contained in super fund with respect to the release of hazardous substances within its borders).

[1, 2] It is fundamental that where a state statute conflicts with a federal statute which has preempted the field and stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, the Supremacy Clause of the United States Constitution mandates that the state

statute must fail. *Maryland v. Louisiana,* 451 *U.S.* 725, 101 *S.Ct.* 2114, 68 *L.Ed.*2d 576 (1981); *Chicago and North Western Transp. Co. v Kalo Brick & Tile Co.,* 450 *U.S.* 311, 101 *S.Ct.* 1124, 67 *L.Ed.*2d 258 (1981); *Arizona v. Snead,* 441 *U.S.* 141, 146, 99 *S.Ct.* 1629, 1632, 60 *L.Ed.*2d 106, 111 (1979); *Mobil Oil Corp. v. Tully,* 653 *F.*2d 497 (Emerg.Ct.App.1981); *Tennessee v. Louisville & N. R. Co.,* 478 *F.Supp.* 199, 209 (M.D.Tenn.1979); *National Carriers' Conf. Comm. v. Heffernan,* 454 *F.Supp.* 914, 915 (D.Conn.1978). Where Congress has not foreclosed the field, a state statute is nevertheless void to the extent of actual conflict with a federal statute. *Ray v. Atlantic Richfield Co.,* 435 *U.S.* 151, 158, 98 *S.Ct.* 988, 994, 55 *L.Ed.*2d 179, 188–189 (1978).

[3] The court is mindful, however, that legislative enactments are presumed to be valid, and the burden on plaintiffs of demonstrating unconstitutionality is a heavy one. *Velmohos v. Maren Engineering Corp.,* 83 *N.J.* 282, 295, 416 A.2d 372 (1980); *North Jersey Suburbanite Co., Inc. v. State,* 154 *N.J.Super.* 126, 129, 381 *A.*2d 34 (App.Div.1977); *English v. Newark Housing Auth.,* 138 *N.J. Super.* 425, 431, 351 *A.*2d 368 (App.Div.1976). Furthermore, the court is conscious of its duty to construe a statute to render it constitutional if the enactment is reasonably susceptible to such interpretation, even though the statute may also be open to a construction which would render it unconstitutional or permit its unconstitutional application. *State v. Profaci,* 56 *N.J.* 346, 349, 266, *A.*2d 579 (1970); *State v. Negron,* 118 *N.J.Super.* 320, 323, 287 *A.*2d 461 (App.Div.1972). *See, also, N.J. Chamber of Commerce v. N.J. Election Law Enforce. Comm'n,* 82 *N.J.* 57, 75, 411 *A.*2d 168 (1980). Additionally, with reference to preemption, the court recognizes that it must attempt to harmonize state and federal laws whenever possible, particularly in areas traditionally reserved to the states and which relate to the vital interests of state citizens. *Florida Lime and Avocado Growers v. Paul,* 373

U.S. 132, 83 *S.Ct.* 1210, 10 *L.Ed.*2d 248 (1963); *Huron Cement Co. v. Detroit,* 362 *U.S.* 440, 443, 80 *S.Ct.* 813, 815, 4 *L.Ed.*2d 852 (1960); *Swift & Co. v. Wickham,* 364 *F.*2d 241 (2 Cir. 1966), *cert.* den., 385 *U.S.* 1036, 87 *S.Ct.* 776, 17 *L.Ed.2d* 683 (1967); *Katharine Gibbs Sch. Inc. v. F. T. C.,* 612 *F.*2d 658, 667 (2 Cir. 1979). Thus, the state act should not be set aside unless the court finds that § 114(c) permits no other conclusion; that the Congress has unmistakably ordained that super fund be the sole recipient of industry tax dollars where the *purposes* of the two acts are identical.

[4] The specific subject of inquiry is that portion of § 114(c) which states:

> . . . [N]o person may be required to contribute to any fund, the purpose of which is to pay compensation for claims for any costs of response or damages or claims which may be compensated under this title.

The pivotal language is "may be compensated" and particularly the word "may". Plaintiffs contend that the phrase is clear and unambiguous and that under the "plain meaning" rule of statutory construction "may" must be employed in its usual literal permissive sense. Accordingly, plaintiffs argue that the sole function of a court is to interpret the statute according to its terms without the aid of extrinsic evidence. The State maintains that § 114(c) is unclear in certain respects, particularly when viewed in the light of the spirit of federal-state cooperation as evidenced by the language of super fund itself, and the impact that a strict and literal interpretation (as contended for by plaintiffs) would have on spill fund which contains far broader substantive coverage and liability provisions than does super fund. In short, the State argues that Congress intended that "may" whould be interpreted in a mandatory sense—an interpretation that, in effect, would substitute "shall be compensated" or "shall have been compensated" for "may be compensated." To ascertain that Congressional intent, the State claims that resort must be had to extrinsic aids.

Plaintiffs further argue that the State's interpretation would violate a second fundamental rule of construction which requires that, if possible, effect must be given to every word, clause or sentence of a statute; that a statute must be construed so that no part is made inoperative, redundant or superfluous. *Colautti v. Franklin,* 439 *U.S.* 379, 392, 99 *S.Ct.* 675, 684, 58 *L.Ed.*2d 596, 607 (1979); *U.S. v. Palmeri,* 630 *F.*2d 192, 199 (3 Cir. 1980); *Abbotts Dairies v. Armstrong,* 14 *N.J.* 319, 327, 102 *A.*2d 372 (1954); *Peper v. Princeton Univ. Bd. of Trustees,* 77 *N.J.* 55, 68, 389 *A.*2d 465 (1978); 2A *Sutherland, Statutory Construction* (3 ed. 1973), § 46.06. The State's interpretation, according to plaintiffs, amounts to a prohibition against double compensation and thus would be redundant of § 114(b) which states:

> Any person who receives compensation for removal costs or damages or claims pursuant to this Act shall be precluded from recovering compensation for the same removal costs or damages or claims pursuant to any other State or Federal law. Any person who receives compensation for removal costs or damages or claims pursuant to any other Federal or State law shall be precluded from receiving compensation for the same removal costs or damages or claims as provided in this Act.

Next, taxpayers claim that such interpretation would nullify the Congressional intent found in the latter portion of § 114(c) which provides that the clause does not preclude a state from using general revenue for duplicate spending or from using taxpayers' contributions for the additional purposes set forth therein. If the State could continue to collect an industry tax for any and all purposes, with the only limitation being payments on claims paid by super fund, plaintiffs assert that the provision concerning the use of general revenue would be purposeless. The

court disagrees with the foregoing and finds that, when read and understood in proper context, the State's interpretation does not render the questioned provisions of super fund inconsistent, redundant, superfluous or meaningless.

The court finds that the pertinent language of § 114(c), does not, by itself, convey that clear, unambiguous meaning attributed to it by plaintiffs—a conclusion that is highlighted when it is read in conjunction with the balance of the super fund act. The seemingly simple, but often misused and misapplied word "may," is anything but unambiguous. The word "may" is often subject to differing meanings when used in statutory construction. Supporting the dual function of the word are the comments of the court in *Kraft v. Board of Ed. for Dist. of Columbia,* 247 *F.Supp.* 21, 24–25 (D.C.D.C.1965), *cert.* den., 386 *U.S.* 958, 87 *S.Ct.* 1026, 18 *L.Ed.*2d 106 (1967), where it was stated:

> It is well established, however, that the word "may" can be at times contrued to mean "shall", just as the word "shall" may be construed to mean "may". The interpretation of those words dependes upon the context in which they are used and the intention of the legislative body as is shown by the statute as may be gleaned from committee reports and similar authoritative sources. [247 *F.Supp.* at 24–25]

Accord, Bell v. Western Employer's Ins. Co., 173 *N.J.Super.* 60, 65, 413 *A.*2d 363 (App.Div.1980); *MacNeil v. Klein,* 141 *N.J.Super.* 394, 358 *A.*2d 488 (App.Div.1976). In light of the ambiguity of the meaning of "may", and in view of the contradictory interpretations which have been voiced as to the interpretation of § 114(c) by both parties, it is essential that this court look to extrinsic aids to clarify the legislative scheme underlying the statutory language. Furthermore, this inquiry requires a consideration of the relationship between the federal and state laws as they are to be *applied,* not merely as they are *written.*

[5] Reference to legislative history is appropriate not only where the statutory language is ambiguous but also where a literal interpretation would thwart the overall statutory scheme. *International T & T Corp. v. General T. & E. Corp.,* 518 *F.*2d 913, 921 (9 Cir. 1975). It is to determine that overall statutory scheme that not only must the legislative history of the statute be examined but attention must also be given to the practical effects of each proffered interpretation. In such a circumstance the New Jersey Supreme Court, in *N.J. Pharmaceutical Ass'n. v. Furman,* 33 *N.J.* 121, 162 *A.*2d 839 (1960), stated:

> Courts may, or course, freely refer to legislative history and contemporaneous construction for whatever aid they may furnish in ascertaining the true intent of the legislation. [at 130, 162 *A.*2d 839.]

Consequently, no rule of statutory construction should be permitted to block consideration of any legislative history which could be of aid to the court. *See id.; In Re Meadowlands Communication Systems, Inc.,* 175 *N.J.Super.* 53, 65, 417 *A.*2d 575 (App.Div.1980), certif. den., 85 *N.J.* 455, 427 *A.*2d 556 (1980); *Marsh v. Finley,* 160 *N.J.Super.* 193, 197, 389 *A.*2d 490 (App.Div.1978), certif. den., 78 *N.J.* 396, 396 *A.*2d 583 (1978); *State v. Moody,* 169 *N.J.Super.* 177, 404 *A.*2d 370 (Law Div. 1978). *See, also, San-Lan Builders, Inc. v. Baxendale,* 28 *N.J.* 148, 155, 145 *A.*2d 457 (1958), where the court counseled that "Scholastic strictness is to be avoided in the search for the legislative intention."

[6] At the outset it is readily apparent that § 114(c) does not preempt *the field* from state participation. By its history and very terms super fund seeks and provides for state participation as partners in the fight against pollution. As such, § 114(c) is not really a preemption clause as that term is classically used. The clause addresses "taxing" and not "participation." Therefore, the initial determination to be made is whether spill

fund imposes a double tax on plaintiffs in light of §114(c) of super fund.[7]

The enactment of super fund in 1980 was a compromise and was preceded by extensive studies and hearings by the Committee on Environment and Public Works concerning various predecessor measures (never adopted) and was accompanied by extensive floor debate. Particularly enlightening are the remarks of Senator Randolph concerning preemption during the Senate floor debate on super fund.[8]

> Mr. President, let me state categorically that there is nothing in this bill that affects the uses to which a state may put the existing cleanup fund. This bill is silent on the subject. Thus a state may, after enactment of this bill, continue to spend its existing funds for any purpose that is lawful under state law.
>
> If, after enactment of this bill, a state continued to pay claims from a state fund, that would not be contrary to any provi-

[7] Preemption aside, neither party addressed the question of whether the spill fund taxing scheme is constitutionally prohibited. Plaintiffs relied on the provisions of § 114(c) as the sole support for their position.

[8] The Randolph remarks in particular are entitled to great weight in interpreting the preemption provision because Senator Randolph was the chairman of the Committee on Environment and Public Works which reported the super fund bill to the Senate, was floor manager and a cosponsor of the measur e, and was clearly involved in the last-minute negotiations leadiing up to the passage of the act. *See, generally,* 126 Cong. Rec. S. 14941–S. 15008 (daily ed. November 24, 1980). In *FEA v. Algonquin SNG, Inc.*, 426 *U. S.* 548, 564, 96 *S.Ct.* 2295, 2304, 49 *L.Ed.*2d 49 (1976), the Supreme Court relied upon Senate floor debates for support in statutory construction and observed in relation to a particular excerpt from a debate that, "as a statement of one of the legislation's sponsors, this explanation deserves to be accorded substantial weight in interpreting the statute." *Accord. Schwegmann Bros. v. Calvert Corp.*, 341 *U.S.* 384, 394, 71 *S.Ct.* 745, 750, 95 *L.Ed.* 1035 (1951); *United States v. Oates*, 560 *F.*2d 45 (2 Cir. 1977); *International T & T Corp. v. General T. & E. Corp.*, 518 *F.*2d 913, 921 (9 Cir. 1975); 2A *Sutherland, Statutory Construction, op.* cit. § 48.04 at 197–198 and § 48.14 at 217–220.

> sion of this bill. *What this bill does is prohibit a state from requiring any person to contribute to any fund if the purpose of that fund is to compensate for a claim paid for under the provisions of this bill . . .*
>
> Putting it simply, this is a prohibition against double taxation for the same purposes. It is not a prohibition on the uses that a state may make of its money, nor does it prohibit a state from imposing fees or taxes for other purposes connected with cleanup or restoration activities such as the purchase of pollution abatement equipment or the hiring or training of personnel for pollution prevention programs.
>
> In summary, Mr. President, this preemption provision is narrow in scope and limited to the particular purpose of preventing double taxation. [126 *Cong.Rec.* S. 14981 (daily ed., November 24, 1980); emphasis supplied]

Moreover, at the end of the colloquy, the following question by Senator Bradley (of New Jersey) elucidated Senator Randolph's position:

> Mr. Bradley: Finally, if the federal government determines that the needs at other sites require that federal efforts be terminated at the first site before that site is completed, may a state fund complete the effort?
>
> Mr. Randolph: This legislation would permit that to happen. *[Id.]*

[7] These remarks can only have been intended to mean that a state can tax local industries to support a fund dedicated to the purpose of compensating claims and costs not actually paid by super fund. Furthermore, any attempt to limit Senator Randolph's remarks to the use of state-collected taxes prior to the effective date of super fund is unfounded in view of the

following statements which clearly were directed to the use of state funds obtained after super fund implementation:

> Mr. Bradley: Am I correct in assuming that monies expended by state funds can be used to provide the required 10 percent state match?
>
> Mr. Randolph: That is correct.
>
> Mr. Bradley: And am I also correct in noting that *state funds are preempted only for efforts which are in fact paid for by the federal fund and that there would be no preemption for efforts which are eligible for federal funds but for which there is no reimbursement?*
>
> Mr. Randolph: *That is correct.* [126 *Cong. Rec.* S. 14981 (daily ed. November 24, 1980); emphasis supplied]

The Randolph interpretation, which would enable states to tax for remedial actions not actually compensated under super fund, comports with a prohibition against double taxation in that states are still prevented from taxing to pay for cleanups actually financed by the Federal Government. Consequently, plaintiffs would not be put in the position of paying twice for the same activity. Based on this interpretation, New Jersey's tax covering hazardous waste cleanups could simply by adjusted to reflect the infusion of federal funds pursuant to super fund. If super fund monies result in a reduction of the state's spending requirements, that reduction can simply be reflected in a decrease in the imposition of state taxes.

In that regard the additional comments of Senator Randolph in response to a question from Senator Bradley are pertinent:

> Mr. Bradley: In the event I have described, where a state or a contractor of the state is the respondent to the release and incurs economic loss normally compensable under the provisions of this bill, does this legislation intend that a state that has continued to collect taxes or fees to finance a state fund designed to

> cover expenses and economic loss not covered under the provision of this bill have the right to use those state fund monies to provide intermediate, up front capital to pay for these activities and seek reimbursement from the fund established under this bill?
>
> Mr. Randolph: Nothing in the language or intent of this bill would prohibit a state from using its fund for the purposes you have inquired about. The purpose of this legislation is simply to preempt double taxation of the substances enumerated in the bill for the purposes of compensation of the *covered* damages. The situation described in your inquiry is a question of *bookkeeping* rather than a subject or preemption. The expenditures by a state from its fund are temporary in nature and would be reimbursed and therefore ultimately paid from the fund established in this legislation. [126 *Cong. Rec.* S. 14981 (daily ed., November 24, 1980), emphasis supplied]

[8] It is important to note that spill fund, as presently constituted, does protect industry from any threat that New Jersey would stockpile spill tax revenues. Spill fund limits the annual amount of revenue that can be collected, *N.J.S.A.* 58:10–23.11h(b), and also provides that the tax will be suspended in the event that the balance in spill fund equals or exceeds $50,000,000. *Id.*

The court also endorses the Randolph interpretation of preemption because that interpretation coincides with the overriding remedial purpose of super fund. *See San-Lan Builders, Inc. v. Baxendale, supra,* which stands for the proposition that the policy and purpose of enactment as a whole is to be used in interpreting specific statutory language in accord with legislative intent. *Accord, N.J. Builders, Owners and Managers Ass'n v. Blair, 60 N.J.* 330, 338, 288 A.2d 855 (1972). If § 114(c) is read to preempt all state taxation for hazardous waste cleanups, the clause would undermine the salutary statutory goals of super fund and would result in actually limiting the number of cleanups which could otherwise be initiated by the state in spite of the fact that super fund was intended to expand cleanup efforts.

A permissive construction of the word "may" would also do violence to the Congressional intent in light of the practicalities of the overall problem and the conditions existing at the time of the passage of super fund. The word "may" is often used similarly to "can," "could," "to be able." It is further used in the sense of "implying power or ability or possibility with a contingency." See *Webster's New Collegiate Dictionary* (1979). In attributing any of these meanings to the term the obvious conclusion is that a state cannot collect a tax if its purpose is to pay a claim or cost which *can, could* or *may possibly be paid* by the Federal Government (assuming approval is given). This interpretation defies logic and common sense when viewed in light of super fund's dependency on state participation to accomplish its goals, its own limitations and the purposes of both acts.

[9] With respect to dependency it has already been noted that, in the adoption of super fund, Congress implicitly acknowledged that direct state action is necessary to assure adequate response action to spills. See §§ 104(c)(2), 104(c)(3), 104(d)(1), 111(f), 112, 114(a). Clearly, therefore, Congress envisioned active state financial, technical and administrative support as an integral part of the overall effort to combat the pollution problem. Under these circumstances it is unrealistic to assume that it was the intent of Congress to prohibit states from collecting and using industry contributions simply because a state may expend those funds on a cleanup program which *may be* a target for super fund expenditures. If a state is prohibited from collecting such funds from a source found by the State Legislature to be the most equitable—a finding which was shared by Congress in enacting super fund—for use in response actions which may also be eligible but which may never be declared eligible or paid under super fund, a state is faced with either abandoning many

containment, cleanup and remedial programs or transferring a tremendous burden to its citizens.[9]

Concerning its limitations it was also recognized by members of Congress that the funding level established in super fund is insufficient to address the magnitude of the problem. See 126 *Cong. Rec.* S. 15007 (daily ed. November 24, 1980) (remarks of Senator Stafford); S. Rep. No. 848, 96th Cong.2d Sess. at 17 and 71. Since super fund allocates only $1.6 billion over a five-year period to remedy hazardous waste sites and spills throughout the 50 states, it is clear that only a small part of the overall cleanup problem can be addressed through the federal legislation. This is especially true when the $1.6 billion is compared to the $4.1 billion originally proposed and the 1979 EPA estimate that it could cost as much as $22.1 billion to clean up all known abandoned hazardous waste sites, to say nothing of emergency spills. See S. Rep. No. 848, 96th Cong., 2d Sess. at 17; H. R. Rep. No. 96–1016, 96th Cong. 2d. Sess. at 20, reprinted in [1980] *U.S. Code Cong. & Ad. News* 6119, 6123.

In further recognition of these funding limits Congress directed the Federal Government to promulgate a National Contingency Plan within 180 days after the enactment of super fund to institute a priority system to govern federal funding. The act directs that the National Contingency Plan contain "criteria for determining priorities among releases or threatened releases throughout the United States for the purpose of taking remedial action and, to the extent practicable, taking into account the potential urgency of such action, for the purpose of taking removal action." § 105(8)(A). This section also provides that

[9] Senator Bradley noted that in New Jersey there are at least 235 known hazardous waste sites requiring attention. 126 *Cong. Rec.* S. 14971 (daily ed. November 24, 1980). The Environmental Protection Association has published a list of priority hazardous waste sites throughout the nation; only 12 of New Jersey's 235 sites qualified for priority treatment under that list.

such criteria be based upon relative risk or danger to the public health and such other factors. *Id.*; see also, § 105(8)(B). This direction and criteria clearly indicate that Congress was aware that super fund, as designed and funded, can reach only "top priority" sites.

Where sites or spills do not satisfy either the general priority criteria set forth in § 105 or the specific priority criteria yet to be adopted in the National Contingency Plan, a state must be permitted to rely on its own industry supported fund to remedy the situation. It simply strains credulity to say that hazardous waste sites or spills not meeting the criteria are claims which "may be compensated" under super fund. Only the future will tell whether such unqualified sites are large or small, many or few, but what is certain is that the adoption of plaintiffs' interpretation of § 114(c) will leave untouched, at the very least, some problem areas—a result which is clearly contrary to the scope and purpose of both super fund and spill fund.

The mere possibility that the tax paid to two governmental entities will be used for identical purposes must be distinguished from those situations wherein identical expenditure must necessarily arise. Neither the express language of super fund nor its criteria (in the absence of a National Contingency Plan it cannot be said that any specific criteria exist) demands the conclusion that there ever will be such a head-on collision of identical expenditures of the tax monies. A mere possibility of double taxation should not be deemed sufficient to extinguish a state's right to collect a tax such as is in question here. Plaintiffs' reliance on an argument that there could be—not that there must be—expenditures for identical purposes misapprehends the nature of the doctrine of preemption. A mere potential expenditure which may be made in the future will not invalidate state authority. More than mere generalizations or speculative

expenditures is required for a court to stifle a state's right to collect this tax.

There is also force to this position when one recognizes that the Environmental Protection Agency's cost estimates do not include the cost of cleaning up hazardous substance pollution from sources other than dump sites, such as accidental spills or discharges. See H.R.Rep.No.96-1016, 96th Cong., 2d Sess., reprinted in [1980] *U.S. Code Cong. & Ad.News* 6139 (comments of Representative Gore to the effect that $600 million would cover the cleanup on only approximately 70 sites out of the thousands that urgently need attention). See, generally, 126 *Cong.Rec.* S. 15007 (daily ed., November 24, 1980) (remarks of Senator Stafford); *id.* at S. 14972 (remarks of Senator Tsongas). Obviously, in the case of emergency, where accidental spills are not within the effective exercise or active range of federal administration, the Congress must content itself to allow the states to use industry tax funds. The ability to use such funds to make such expenditures is critical to a state which must be able to move without delay when volatile situations arise. To forbid a state from raising tax money altogether for hazardous substance cleanups and to depend strictly on general revenues for funding would effectively disable a state from responding to emergency situations. It cannot be said the Congress would deprive the states of a primary source of funds for the purposes of combating situations over which the Federal Government neither chooses to nor, as a practical matter, could control. A contrary conclusion would be inconsistent with a proper regard for the interplay of state and national interests.

[10] The scheme of super fund is one which allows, but does not require, cooperation of the federal and state regimes. If a state chooses, or if the Federal Government through disapproval of a state request requires it, to take either the lead or the entire financial responsibility of cleaning up a specific spill prob-

lem, it should be free to use an industry supported fund to do so. In such instances the possiblity that the financial burden on a state is greater than it may have been had the Federal Government done the cleanup work can afford plaintiffs no comfort in their arguments against the constutionality of the state tax. Additionally, it is noted that the question is not before this court.

Against this background the court finds that § 114(c) of super fund does not preempt the State of New Jersey from collecting a spill tax to be used to pay hazardous waste cleanup costs and related claims not covered or actually compensated under super fund.

While this finding effectively disposes of plaintiffs' claim, the court finds that there exists another, and equally compelling, reason why plaintiffs' motion must be denied. Even if it were found that industry-supported tax monies could not be collected for general containment, cleanup and remedial purposes, the spill fund law nevertheless encompasses many other areas to which such monies could be devoted which are clearly outside the reach of § 114(c) and which may very well be of sufficient magnitude to sustain the spill fund tax. As noted earlier, plaintiffs' sole attack against spill fund is based on the preemption provisions of § 114(c). Except for the federal Supremacy Clause argument based on § 114(c), plaintiffs neither raised nor attempted to support any argument that the taxing provisions of spill fund were violative of any other constitutional rights. Thus, plaintiffs do not suggest that there is an actual conflict between the limited purposes of super fund and the overall policy enunciated by New Jersey in spill fund. Indeed, it may be said that the complete enforcement of the state act might well effectuate the policy of the federal statute.

[11] It is noted first that § 114(c) explicitly exempts from its provisions a state tax on the petrochemical industries in order to finance (1) the purchase of hazardous response equipment,

(2) the prepositioning of such response equipment and (3) other preparations for the response to a release of hazardous substances. Spill fund specifically authorizes such use of its fund monies. *N.J.S.A.* 58:10–23.11*o*(4). Clearly, the spill fund tax is valid in so far as such monies are used to satisfy these purposes.

That these categories do not represent the exclusive purposes to which spill fund tax monies may be devoted is disclosed by a comparison of the coverage of the two acts. It is first noted that super fund, by its very definition of hazardous substance and pollutant and/or contaminant, excludes petroleum and crude oil. § 101. Compare *N.J.S.A.* 58:10–23.11b(k). Petroleum spills, not being compensable under super fund, it is clear that the spill fund tax may be collected and used to pay such claims—an additional nonpreempted use of tax revenues which is authorized by the New Jersey Act.

[12, 13] Similarly, super fund makes no provision for the compensation of nongovernmental, third-party damage claims. *N.J.S.A.* 58:10–23.11g(a)(1) makes spill fund liable for all such direct and indirect damages caused by a discharge of hazardous substances. Accordingly, such claims are within the scope of proper spill fund spending under § 114(c).

Additionally, spill fund authorizes payments for income or property value losses caused by damage resulting from a discharge of hazardous substances. Furthermore, spill fund covers the cost of restoration or replacement of natural resources damaged or destroyed by a discharge. Conversely, super fund provides limited damage coverage in relation to natural resources and authorizes such compensation only if the release occurred after December 11, 1980 and only if the claimants are the United States or a state. Compare §§ 107(a)(4)(A), 107(f), 111(c)(2), and 111(d)(1) with *N.J.S.A.* 58:10–23.11g(a). Furthermore, super fund does not explicitly cover state fund administrative expenses and clearly does not support spill fund admin-

istrative costs relating to petroleum spills, the reimbursement of third-party damage claims, and other claims not compensable under the federal act. Accordingly, these expenditures are also proper objects of spill fund spending.

Additionally, § 104(c)(3) of super fund specifically provides that a state must contribute 10% or more "of the costs of remedial action including all future maintenance," in order to qualify for federal funding. This expenditure obviously represents a cost or claim which cannot be compensated by super fund and accordingly is beyond the preemptive scope of § 114(c) and thus a proper object of state taxation and spill fund spending. Additionally, a state is free to provide up-front operating dollars from its industry-supported spill fund to finance remedial activities on a temporary basis pending super fund reimbursement.

Clearly, it is evident that the foregoing areas are appropriate subjects of spill fund taxing in that they are not precluded by super fund. That conclusion is supported by the comments made by key legislators in connection with the debates surrounding the adoption of super fund, and particularly those (earlier noted) of Senator Randolph. See 126 *Cong.Rec.*S. 14981 (daily ed., November 24, 1980) (remarks of Senators Bradley and Randolph). The remarks by these legislators clearly indicate that industry-supported state funds may be used to pay for costs associated with releases of hazardous substances which are not covered by super fund.

Plaintiffs argue, however, that these nonpreempted areas are peripheral in nature and cannot be severed from the overriding purposes of the state act, *i.e.*, cleanup and removal costs of spills. According to plaintiffs, there exists no possibility that the State Legislature could have intended the tax to remain in effect if the principal object—cleanup and removal costs—is deleted from the State's operation.

Spill fund (*N.J.S.A.* 58:10–23.11w) contains a general severability clause which provides that

> If any section, subsection, provision, clause or portion of this act is adjudged unconstitutional or invalid by a court of competent jurisdiction, the remainder of this act shall not be affected thereby.

The rule of severability was succinctly set forth in *Affiliated Distillers Brands Corp. v. Sills*, 60 *N.J.* 342, 289 *A.*2d 257 (1972):

> Severability is a question of legislative intent. That intent must be determined on the basis of whether the objectionable feature of the statute can be excised without substantial impairment of the principle object of the statute. 56 *N.J.* at 265 [266 *A.*2d 579]; *N.J. Chapter Am. I.P. v. N.J. State Board of Professional Planners*, 48 *N.J.* 581, 593 [227 *A.*2d 313] appeal dismissed and cert. denied, 389 *U.S.* 8, [88 *S.Ct.* 70, 19 *L.Ed.*2d 8] (1967); *Angermeier v. Boro of Sea Girt*, 27 *N.J.* 298, 311 [142 *A.*2d 624] (1958). To justify severance of a part of a statute "there must be such a manifest independence of the parts as to clearly indicate a legislative intention that the constitutional insufficiency of the one part would not render the remainder inoperative." *Washington National Insurance Company v. Board of Review*, 1 *N.J.* 545, 556 [64 *A.*2d 443] (1949); *Yanow v. Seven Oaks Park, Inc.*, 11 *N.J.* 341, 361 [94 *A.*2d 482] (1953) [at 345–346, 289 *A.*2d 257.]

Although plaintiffs may characterize petroleum spill cleanups as a "peripheral" purpose of spill fund, the act does not support such a conclusion in spite of the fact that in the first four years of its existence the spill fund did disburse 93% of its revenue for the cleanup and containment of nonpetroleum hazardous waste substances. That the spill fund has not incurred substantial expenses for oil spill cleanups reflects the good fortunes of New Jersey and should not be considered a diminishment of the importance of the portions of the act relating to petroleum spills.

Furthermore, the legislative findings set forth in *N.J.S.A.* 58:10-23.11a emphasize the need to protect New Jersey's coastal areas and tourist trade from oil spills:

> The Legislature finds and declares: that New Jersey's lands and waters constitute a unique and delicately balanced resource; that the protection and preservation of these lands and waters promotes the health, safety and welfare of the people of this State; that the tourist and recreation industry dependent on clean waters and beaches is vital to the economy of this State; that the State is the trustee, for the benefit of its citizens, of all natural resources within its jursdiction; and that the storage and transfer of petroleum products and other hazardous substances between vessels, between facilities and vessels, and between facilities, whether onshore or offshore, is a hazardous undertaking and imposes risks of damage to persons and property within this State.
>
> The Legislature finds and declares that the discharge of petroleum products and other hazardous substances within or outside the jurisdiction of this State constitutes a threat to the economy and environment of this State. The Legislature intends by the passage of this act to exercise the powers of this State to control the transfer and storage of hazardous substances and to provide liability for damage sustained within this State as a result of any discharge of said substances, by requiring the prompt containment and removal of such pollution and substances, and to provide a fund for swift and adequate compensation to resort businesses and other persons damaged by such discharge.

Only the future will tell whether spill fund spending scales will continue to be balanced in favor of nonpetroleum spill requirements.

[14] Additionally, spill fund itself indicates a legislative recognition that the statute should be read in conjunction with other laws and should survive federal entrance into the hazardous waste cleanup field. In recognition of the possible entry of

the Federal Government into the field, *N.J.S.A.* 58:10–23.11z provides:

> If the United States Congress enacts legislation providing compensation for the discharge of petroleum and hazardous products, the Commissioner shall determine to what degree that legislation shall provide for the needed protection for our citizens, businesses and environment and shall make the appropriate recommendation to the legislature for amendments to this Act.

Such provision evinces a legislative intent that every purpose of spill fund was to be accomplished.

Moreover, the Legislature specifically envisioned that the spill act would be enforced in conjunction with any other applicable law. In *N.J.S.A.* 58:10–23.11v the Legislature specifically provided that

> Nothing in this act shall be deemed to preclude the pursuit of any other civil or injunctive remedy by any person. The remedies provided in this act are in addition to those provided by existing statutory or common law, but no person who receives compensation for damages or cleanup costs pursuant to any other State or Federal law shall be permitted to receive compensation for the same damages or cleanup costs under this act.

Under the statute as presently written, then, the spill act must be administered in conjunction with, and supplementary to, any federal programs in the hazardous waste area.

In view of the foregoing the court finds that even if § 114(c) of super fund could be construed to preempt part of spill fund, the aforementioned nonpreempted areas are more than sufficient to sustain its continued validity. The underlying intent of spill fund simply indicates that the level of dependence between the alleged preempted and admitted nonpreempted areas that is necessary for this court to find the whole scheme

inseparable is not present. *Affiliated Distillers Brands Corp. v. Sills, supra.*

The court finds that Congress, through the adoption of super fund, has not put an end to the taxing powers of the states for hazardous substance cleanup, containment and remedial purposes by putting another tax in its place. Rather, the court finds that super fund permits a state to continue to avail itself of industry tax funds with the obvious limitation that a double tax could not be collected and expended on any one project. Such would be the practicalities of government where both state and nation have the same and yet separate, identifiable interests. Such can be the only conclusion unless Congress leaves no doubt that the Federal Government is to be the sole recipient of the tax monies needed to effectuate such purposes so as to leave no room for concert. No such finding can be made here. This court believes that Congress has not preempted the right of states to protect their residents' pocketbooks as well as their environment.

The third and fouth counts of Docket SC 319A–81TC survive judgment and will proceed to trial.[10] The Clerk of the Tax Court will enter judgments dismissing Docket SC 303A–81 in its entirety and Docket SC 319A–81TC as to counts one and two.

[10] In the third count of their complaint plaintiffs seek relief from payment of an alleged disproportionate share of the spill fund tax. In the fourth count plaintiffs demand judgment directing the Commissioner of the Department of Environmental Protection to make recommendations to the New Jersey Legislature for amendments to spill fund pursuant to *N.J.S.A.* 58:10–23.11z.

The Tax Court of New Jersey

DOCKET NO. SC 303A-81
SC319A-81TC

Civil Action

JUDGMENT

EXXON CORPORATION, THE BFGOODRICH COMPANY, UNION CARBIDE CORPORATION, MONSANTO COMPANY AND TENNECO CHEMICALS, INC.,

Plaintiffs,

vs.

ROBERT HUNT, Administrator of New Jersey Spill Compensation Fund; CLIFFORD A. GOLDMAN, Treasurer of the State of New Jersey; SIDNEY GLASER, Director of the Division of Taxation; and THE STATE OF NEW JERSEY,

Defendants.

EXXON CORPORATION, THE BFGOODRICH COMPANY, UNION CARBIDE CORPORATION, MONSANTO COMPANY AND TENNECO CHEMICALS, INC.,

Plaintiffs,

vs.

ROBERT HUNT, Administrator of New Jersey Spill Compensation Fund; CLIFFORD A. GOLDMAN, Treasurer of the State of New Jersey; SIDNEY GLASER, Director of the Division of Taxation; JERRY F. ENGLISH, Commissioner of Environmental Protection; and THE STATE OF NEW JERSEY,

Defendants.

Complaints having been filed with the Tax Court of New Jersey and the parties having filed cross-motions for summary judgment, and the court having considered the arguments and evidence presented by or on behalf of the parties, and having denied plaintiffs' motion and granted defendants' motion, it is

ORDERED AND ADJUDGED that docket number SC 303A-81 be and is hereby dismissed and docket number SC 319A-81TC as to counts one and two be and is hereby dismissed.

/s/ D. Jean Hancikovsky
D. JEAN HANCIKOVSKY,
Acting Clerk
Tax Court of New Jersey

ENTERED: April 23, 1982
X-11-30-81-6-JE

Filed November 19, 1984
Supreme Court of New Jersey

IN THE

Supreme Court of New Jersey

DOCKET NO. 21,567

EXXON CORPORATION, THE BF GOODRICH COMPANY, UNION CARBIDE CORPORATION, MONSANTO COMPANY AND TENNECO CHEMICALS, INC.,
Plaintiffs-Appellants,

v.

ROBERT HUNT, Administrator of New Jersey Spill Compensation Fund; CLIFFORD A. GOLDMAN, Treasurer of the State of New Jersey; SIDNEY GLASER, Director of the Division of Taxation, JERRY F. ENGLISH, Commissioner of Environmental Protection, and THE STATE OF NEW JERSEY,
Defendants-Respondents.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

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TO: ROBERT HUNT
Administrator of New Jersey Spill Compensation Fund
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KENNETH R. BIEDERMAN
Treasurer of the State of New Jersey
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ROBERT E. HUGHEY
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SIRS:

NOTICE IS HEREBY GIVEN that Exxon Corporation, The BFGoodrich Company, Union Carbide Corporation, Monsanto Company and Tenneco Chemicals, Inc., the Plaintiffs-Appellants above named, hereby appeal to the Supreme Court of the United States from the final Order of the Supreme Court of the State of New Jersey affirming the constitutionality of the New Jersey Spill Compensation and Control Act, entered herein on September 19, 1984.

This Appeal is taken pursuant to 28 U.S.C. § 1257(2).

FARRELL, CURTIS, CARLIN & DAVIDSON

By /s/ JOHN J. CARLIN, JR.
John J. Carlin, Jr.
Attorneys for Plaintiffs-Appellants

CERTIFICATION OF SERVICE

We hereby certify that copies of the within Notice of Appeal were served on Robert Hunt, Administrator of the New Jersey Spill Compensation Fund; Kenneth R. Biederman, Treasurer of the State of New Jersey; Robert E. Hughey, Commissioner of Environmental Protection; John R. Baldwin, Director of the Division of Taxation; and Irwin I. Kimmelman, Attorney General of the State of New Jersey pursuant to Rule 28(5) of the United States Supreme Court by certified mail, return receipt requested on November 19, 1984.

FARRELL, CURTIS, CARLIN & DAVIDSON

By /s/ JOHN J. CARLIN, JR.
John J. Carlin, Jr.

58:10–23.11f Discharge of hazardous substance; removal and cleanup; discharge of detergent; approval of administrator; funds and payment for removal; private residential wells; payments for restoration, replacement or alternative water supply

a. Whenever any hazardous substance is discharged, the department may, in its discretion act to remove or arrange for the removal of such discharge or may direct the discharger to remove, or arrange for the removal of, such discharge. Any discharger who fails to comply with such a directive shall be liable to the department in an amount equal to three times the cost of such removal.

Removal of hazardous substances and actions to minimize damage from discharges shall, to the greatest extent possible, be in accordance with the National Contingency Plan for removal of oil and hazardous substances established pursuant to section 311(c)(2) of the Federal Water Pollution Control Act Amendments of 1972 (P.L. 92-500, 33 U.S.C. 1251 et seq.).

Whenever the department acts to remove a discharge or contracts to secure prospective removal services, it is authorized to draw the money available in the fund. Such moneys shall be used to pay promptly for all cleanup costs incurred by the department in removing or in minimizing damage caused by such discharge.

Nothing in this section is intended to preclude removal and cleanup operations by any person threatened by such discharges, provided such persons coordinate and obtain approval for such ongoing State or Federal operations. No action taken by any person to contain or remove a discharge shall be construed as an admission of liability for said discharge. No person who renders assistance in continuing or removing a discharge shall be liable for any civil damages to third parties resulting solely from acts or omissions of such person in rendering such assistance except for acts or omissions of gross negligence or willful misconduct. In the course of cleanup operations, no person shall discharge any detergent into the waters of this State without prior authorization of the commissioner.

b. Notwithstanding any other provisions of P.L.1976, c. 141 (C. 58:10–23.11 et seq.), the department, after notifying the administrator and subject to the approval of the administrator with regard to the availability of funds therefor, may remove or arrange for the removal of any hazardous substance which:

(1) Has not been discharged from a grounded or disabled vessel if the department determines that such removal is necessary to prevent an imminent discharge of such hazardous substance;

(2) Has not been discharged if the department determines that such substance is not satisfactorily stored or contained and said substance possesses any one or more of the following characteristics:

(a) explosiveness;

(b) high flammability;

(c) radioactivity;

(d) chemical properties which in combination with any discharged hazardous substance at the same storage facility would create a substantial risk of imminent damage to public health or safety or an imminent and severe damage to the environment;

(e) is stored in a container from which its discharge is imminent as a result of contact with a hazardous substance which has already been discharged and such additional discharge would create a substantial risk of imminent damage to public health or safety or imminent and severe damage to the environment; or

(f) high toxicity and is stored or being transported in a container or motor vehicle, truck, railcar or other mechanized conveyance from which its discharge is imminent as a result of the significant deterioration or the precarious location of the container, motor vehicle, truck, railcar or other mechanized conveyance, and such discharge would create a substantial risk of imminent damage to public health or safety or imminent and severe damage to the environment; or

(3) Has been discharged prior to the effective date of the act to which this act is amendatory, if such discharge poses a substantial risk of imminent damage to the public health or safety or imminent and severe damage to the environment.

c. If and to the extent that he determines that funds are available, the administrator shall approve and make payments for any cleanup and removal costs incurred by the department for the removal of a hazardous substance other than petroleum as authorized by subsection b. of this section; provided that in determining the availability of funds, the administrator shall not include as available funds revenues realized or to be realized from the tax on the transfer of petroleum to the extent that such revenues result from a tax levied at a rate in excess of $0.-01 per barrel, pursuant to subsection 9b. of the act to which this act is amendatory, unless the administrator determines that the sum of claims paid by the fund on behalf of petroleum discharges or removals plus pending reasonable claims against the fund on behalf of petroleum discharges or removals is greater than 30% of the sum of all claims paid by the fund plus all pending, reasonable claims against the fund.

d. The administrator may only approve and make payments for any cleanup and removal costs incurred by the department for the removal of a hazardous substance discharged prior to the effective date of the act to which this act is amendatory, pursuant to subsection b. of this section, if, and to the extent that, he determines that adequate funds from another source are not or will not be available; and further provided, with regard to the cleanup and removal costs incurred for discharges which occurred prior to the effective date of the act which this act is amendatory, the administrator may not during any 1 year period pay more than $3,000,000.00 in total or more than $1,500,000.00 for any discharge or related set or series of discharges.

e. Notwithstanding any other provisions of P.L.1976, c. 141, the administrator, upon the approval of the department after considering, among any other relevant factors, its priorities for spending funds pursuant to P.L.1976, c. 141, and within the limits of available funds, shall make payments for the restoration or replacement of, or connection to an alternative water supply for, any private residential well destroyed, contaminated, or impaired as a result of a discharge prior to the effective date of P.L.1976, c. 141, provided, however total payments for said purpose shall not exceed $500,000.00 for the period between the effective date of the subsection (e) and January 1, 1983, and in any calendar year thereafter.

(f) Any expenditures made by the administrator pursuant to this act shall constitute a first priority claim and lien paramount to all other claims and liens upon the revenues and all real and personal property of the discharger, whether or not the discharger is insolvent.

L.1976, c. 141, § 7. Amended by L.1979, c. 346, § 4; L.1981, c. 25, § 1, eff. Feb. 9, 1981.

58:10–23.11g Liabilites for cleanup and removal costs and direct and indirect damages

a. The fund shall be strictly liable, without regard to fault, for all cleanup and removal costs and for all direct and indirect damages no matter by whom sustained, including but not limited to:

(1) The cost of restoring, repairing, or replacing any real or personal property damaged or destroyed by a discharge, any income lost from the time such property is damaged to the time such property is restored, or repaired or replaced, and any reduction in value of such property caused by such discharge by comparison with its value prior thereto;

(2) The cost of restoration and replacement, where possible, of any natural resource damaged or destroyed by a discharge;

(3) Loss of income or impairment of earning capacity due to damage to real or personal property, including natural resources destroyed or damaged by a discharge; provided that such loss or impairment exceeds 10% of the amount which claimant derives, based upon income or business records, exclusive of other sources of income, from activities related to the particular real or personal property or natural resources damaged or destroyed by such discharge during the week, month or year for which the claim is filed;

(4) Loss of tax revenue by the State or local governments for a period of 1 year due to damage to real or personal property proximately resulting from a discharge;

(5) Interest on loans obtained or other obligations incurred by a claimant for the purpose of ameliorating the adverse effects of a discharge pending the payment of a claim in full as provided by this act.

b. The damages which may be recovered by the fund, without regard to fault, subject to the defenses enumerated in subsection d. of this section against the owner or operator of a major facility or vessel, shall not exceed $50,000,000.00 for each major facility or $150.00 per gross ton for each vessel, except that such maximum limitation shall not apply and the owner or operator shall be liable, jointly and severally, for the full amount of such damages if it can be shown that such discharge was the result of (1) gross negligence or willful misconduct, within the knowledge or privity of the owner, operator or person in charge, or (2) a gross or willful violation of applicable safety, construction or operating standards or regulations. Damages which may be recovered from, or by, any other person shall be limited to those authorized by common or statutory law.

c. Any person who has discharged a hazardous substance or is in any way responsbile for any hazardous substance which the department has removed or is removing pursuant to subsec-

tion b. of section 7 of this act shall be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs.

d. An act or omission caused solely by war, sabotage, or God, or a combination thereof, shall be the only defenses which may be raised by any owner or operator of a major facility or vessel responsible for a discharge in any action arising under the provisions of this act.

L.1976, c. 141, § 8. Amended by L.1979, c. 346, § 5.

N.J.S.A. 58:10-23.11h

TAXATION OF MAJOR FACILITIES; RATE; REFUND OR CREDIT; CLAIMS EXCEEDING FUND BALANCE; FAILURE TO FILE OR PAY TAX

a. There is hereby levied upon each owner or operator of one or more major facilities a tax to insure compensation for cleanup costs and damages associated with any discharge of hazardous substances to be paid by the transferee; provided, however, that in the case of a major facility which operates as a public storage terminal for hazardous substances owned by others, the owner of the hazardous substance transferred to such major facility or his authorized agent shall be considered to be the transferee or transferor, as the case may be, for the purposes of this section and shall be deemed to be a taxpayer for purposes of this act. Where such person has failed to file a return or pay the tax imposed by this act within 60 days after the due date thereof, the director shall forthwith take appropriate steps to collect same from the owner of the hazardous substance. In the event the director is not successful in collecting said tax then on notice to the owner or operator of the public storage terminal of said fact said owner or operator shall not release any hazardous substance owned by the taxpayer. The director may forthwith proceed to satisfy any tax liability of the taxpayer by seizing, selling or otherwise disposing of said hazardous substance to satisfy the taxpayer's tax liability and to take any further steps permitted by law for its collection. For the purposes of this act

public storage terminal shall mean a public or privately owned major facility operated for public use which is used for the storage or transfer of hazardous substances. The tax shall be measured by the number of barrels or the fair market value, as the case may be, of hazardous substances transferred to the major facility, provided, however, that the same barrel, including any products derived therefrom, subject to multiple transfers from or between major facilities shall be taxed only once at the point of the first transfer.

When a hazardous substance other than petroleum which has not been previously taxed is transferred from a major in-State facility to a facility which is not a major facility, the transferor shall be liable for tax payment for said transfer.

b. The tax shall be $0.01 per barrel transferred and in the case of the transfer of hazardous substances other than petroleum or petroleum products, the tax shall be the greater of $0.01 per barrel or 0.4% of the fair market value of the product, until the balance in the fund equals or exceeds $50,000,000.00; provided, however, that with respect to transfers of hazardous substances other than petroleum or petroleum products which are or contain any precious metals to be recycled, refined, or rerefined in this State, or which are transferred into this State subsequent to being recycled, refined or rerefined, the tax shall be $0.01 per barrel of the hazardous substance. For the purpose of this section, "precious metals" means gold, silver, osmium, platinum, palladium, iridium, rhodium, ruthenium and copper. In each fiscal year following any year in which the balance of the fund equals or exceeds $50,000,000.00, no tax shall be levied unless (1) the current balance in the fund is less than $40,000,000.00 or (2) pending claims against the fund exceed 50% of the existing balance of the fund. The provisions of the foregoing notwithstanding, should claims paid from or pending against the fund not exceed $5,000,000.00 within 3 years after the tax is first levied, the tax shall be $0.01 per barrel transferred or 0.4% of the fair market value of the product, as the case may be, until the balance in the fund equals or exceeds $36,000,000.00, and thereafter shall not be levied unless: (1) the current balance in

the fund is less than $30,000,000.00 or (2) pending claims against the fund exceed 50% of the existing balance of the fund. In the event of either such occurrence and upon certification thereof by the State Treasurer, the director shall within 10 days of the date of such certification relevy the excise tax, which shall take effect on the first day of the month following such relevy. With respect to the tax imposed upon the transfer of hazardous substances which are other than petroleum or petroleum products, if the revenues from such tax exceed $7,000,000.00 during any calendar year, such excess shall be refunded or credited to the taxpayers who paid such tax during the calendar year. The refund or credit shall be based upon the amount of taxes paid by each taxpayer on transfers of hazardous substances which are other than petroleum or petroleum products for the calendar year in proportion to all taxes paid by all taxpayers on such transfers during said year; provided, however, that if at the end of the calendar year the increased tax rate as authorized by this subsection of subsection i. is in effect, no refund or credit shall be allowed for such calendar year; and further, provided that no refund or credit shall be allowed for a calendar year if by reason of such refund or credit a condition would occur which would authorize the imposition of the tax at the higher rate authorized in this subsection or subsection i. However, a partial refund or credit shall be allowed to the extent that such a condition would not occur. In the event of a major discharge or series of discharges resulting in reasonable claims against the fund exceeding the existing balance of the fund, the tax shall be levied as follows:

(1) On petroleum or petroleum products, at the rate of $0.04 per barrel transferred, until the revenue produced by such increased rate equal 150% of the total dollar amount of all pending reasonable claims resulting from the discharge of petroleum or petroleum products; provided, however, that such rate may be set at less than $0.04 per barrel transferred if the administrator determines that the revenue produced by such lower rate will be sufficient to pay outstanding reasonable claims against the fund within 1 year of such levy; and

(2) On hazardous substances other than petroleum or petroleum products, at the rate of the greater of $0.04 per barrel transferred or 0.8% of the fair market value of such hazardous substance, until the revenue produced by such increased rate equals 150% of the total dollar amount of all pending reasonable claims resulting from the discharge of hazardous substances other than petroleum or petroleum products; provided, however, that with respect to transfers of hazardous substances other than petroleum or petroleum products which are or contain any precious metals to be recycled, refined or rerefined in this State, or which are transferred into this State subsequent to being recycled, refined, or rerefined, the tax shall be $0.04 per barrel of the hazardous substances; and provided further, however, that any such increased tax rate on hazardous substances other than petroleum or petroleum products may be set at less than $0.04 per barrel transferred, or 0.8% of the fair market value of the hazardous substance, as the case may be, if the administrator determines that the revenue produced by such lower rate shall be sufficient to pay outstanding reasonable claims against the fund within 1 year of such levy.

Interest received on moneys in the fund shall be credited to the fund. Should the fund exceed $36,000,000.00 or $50,000,000.00, as herein provided, as a result of such interest, the administrator and the commissioner shall report to the Legislature and the Governor concerning the options for the use of such interest.

c. (1) Every taxpayer and owner or operator of a public storage terminal for hazardous substances shall on or before the twentieth day of the month following the close of each tax period render a return under oath to the director on such forms as may be prescribed by the director indicating the number of barrels of hazardous substances transferred and where appropriate, the fair market value of the hazardous substances transferred to or from the major facility, and at said time the taxpayer shall pay the full amount of the tax due.

(2) Every taxpayer or owner or operator of a major facility or vessel which transfers a hazardous substance, as defined in this act, and who is subject to the tax under subsection a. shall within 20 days after the first such transfer in any fiscal year register with the director on such form as shall be prescribed by him.

d. If a return required by this act is not filed, or if a return when filed is incorrect or insufficient in the opinion of the director, the amount of tax due shall be determined by the director from such information as may be available. Notice of such determination shall be given to the taxpayer liable for the payment of the tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed, within 30 days after receiving notice of such determination, shall apply to the director for a hearing, or unless the director on his own motion shall redetermine the same. After such hearing the director shall give notice of his determination to the person to whom the tax is assessed.

e. Any taxpayer who shall fail to file his return when due or to pay any tax when the same becomes due, as herein provided, shall be subject to such penalties and interest as provided in the "State Tax Uniform Procedure Law," Subtitle 9 of Title 54 of the Revised Statutes. If the Division of Taxation determines that the failure to comply with any provision of this section was excusable under the circumstances, it may remit such part or all of the penalty as shall be appropriate under such circumstances.

f. (1) Any person failing to file a return, failing to pay the tax, or filing or causing to be filed, or making or causing to be made, or giving or causing to be given any return, certificate, affidavit, representation, information, testimony or statement required or authorized by this act, or rules or regulations adopted hereunder which is willfully false, or failing to keep any records required by this act or rules and regulations adopted hereunder, shall, in addition to any other penalties herein or elsewhere prescribed, be guilty of a misdemeanor.

(2) The certificate of the director to the effect that a tax has not been paid, that a return has not been filed, that information has not been supplied or that inaccurate information has been supplied pursuant to the provisions of this act or rules or regulations adopted hereunder shall be presumptive evidence thereof.

g. In addition to the other powers granted to the director in this section, he is hereby authorized and empowered:

(1) To delegate to any officer or employee of his division such of his powers and duties as he may deem necessary to carry out efficiently the provisions of this section, and the person or persons to whom such power has been delegated shall possess and may exercise all of said powers and perform all of the duties delegated by the director;

(2) To prescribe and distribute all necessary forms for the implementation of this section.

h. The tax imposed by this act shall be governed in all respects by the provisions of the "State Tax Uniform Procedure Law," Subtitle 9 of Title 54 of the Revised Statutes, except only to the extent that a specific provision of this act may be in conflict therewith.

i. Notwithstanding any other provisions of this section, the Treasurer may order the director to levy the tax on all hazardous substances other than petroleum or petroleum products at a specified rate greater than $0.01 per barrel or 0.4% of the fair market value of the product, as the case may be, but in no event to exceed $0.04 per barrel with respect to transfers of hazardous substances other than petroleum or petroleum products which are or contain any precious metals to be recycled, refined or rerefined in this State, or which are transferred into this State subsequent to being recycled, refined or rerefined, or the greater of $0.04 per barrel or 0.6% of the fair market value of the product with respect to transfers of any other hazardous substances other than petroleum or petroleum products, if and as long as the administrator determines the following:

(1) That pending, reasonable claims against the fund for hazardous substances other than petroleum or petroleum products exceed 70% of the existing balance of the fund, and

(2) That the sum of the claims paid by the fund on behalf of discharges or removals of hazardous substances other than petroleum or petroleum products plus pending, reasonable claims against the fund on behalf of discharges or hazardous substances other than petroleum is equal to or greater than 70% of all claims paid by the fund plus all pending, reasonable claims against the fund.

The provisions of this subsection shall not preclude the imposition of the tax at the higher rate authorized under subsection b. of this section.

L.1976, c. 141, § 9. Amended by L.1979, c. 6, § 1, eff. Jan. 18, 1979; L.1979, c. 346, § 6; L.1980, c. 73, § 3, eff. July 21, 1980.

58.10–23.11*o* Disbursement of moneys from fund; purposes

Moneys in the New Jersey Spill Compensation Fund shall be disbursed by the administrator for the following purposes and no others:

(1) Costs incurred under section 7 of this act;[1]

(2) Damages as defined in section 8 of this act;[2]

(3) Such sums as may be necessary for research on the prevention and the effects of spills of hazardous substances on the marine environment and on the development of improved cleanup and removal operations as may be appropriated by the Legislature; provided, however, that such sums shall not exceed the amount of interest which is credited to the fund;

(4) Such sums as may be necessary for the boards, general administration of the fund, equipment and personnel costs of the department and any other State agency related to the enforcement of this act as may be appropriated by the Legislature;

(5) Such sums as may be appropriated by the Legislature for research and demonstration programs concerning the causes and abatement of ocean pollution; provided, however, that such sums shall not exceed the amount of interest which is credited to the fund.

The Treasurer may invest and reinvest any moneys in said fund in legal obligations of the United States, this State or any of its political subdivisions. Any income or interest derived from such investment shall be included in the fund.

L.1976, c. 141, § 16.

[1]Section 58:10-23.11f.

[2]Section 58:10-23.11g.

58:10–23.11v Inapplicability of act to pursuit of other remedy; double compensation for same damages or costs; prohibition

Nothing in this act shall be deemed to preclude the pursuit of any other civil or injunctive remedy by any person. The remedies provided in this act are in addition to those provided by existing statutory or common law, but no person who receives compensation for damages or cleanup costs pursuant to any other State or Federal law shall be permitted to receive compensation for the same damages or cleanup costs under this act.

L.1976, c. 141, § 23.

58:10–23.11z Recommendations for amendments to this act to conform with federal legislation

If the United States Congress enacts legislation providing compensation for the discharge of petroleum and hazardous products, the commissioner shall determine to what degree that legislation provides the needed protection for our citizens, businesses and environment and shall make the appropriate recommendations to the Legislature for amendments to this act.

L.1976, c. 141, § 27.

§ 9601. Definitions

For purpose of this subchapter, the term—

(1) "act of God" means an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight;

(2) "Administrator" means the Administrator of the United States Environmental Protection Agency;

(3) "barrel" means forty-two United States gallons at sixty degrees Fahrenheit:

(4) "claim" means a demand in writing for a sum certain;

(5) "claimant" means any person who presents a claim for compensation under this chapter;

(6) "damages" means damages for injury or loss of natural resources as set forth in section 9607(a) or 9611(b) of this title;

(7) "drinking water supply" means any raw or finished water source that is or may be used by a public water system (as defined in the Safe Drinking Water Act [42 U.S.C.A. 300f et seq.]) or as drinking water by one or more individuals;

(8) "environment" means (A) the navigable waters, the waters of the contiguous zone, and the ocean waters of which the natural resources are under the exclusive management authority of the United States under the Magnuson Fishery Conservation and Management Act [16 U.S.C.A. 1801 et seq.], and (B) any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States;

(9) "facility" means (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer

or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel;

(10) "federally permitted release" means (A) discharges in compliance with a permit under section 1342 of Title 33, (B) discharges resulting from circumstances identified and reviewed and made part of the public record with respect to a permit issued or modified under section 1342 of Title 33 and subject to a condition of such permit, (C) continuous or anticipated intermittent discharges from a point source, identified in a permit or permit application under section 1342 of Title 33, which are caused by events occurring within the scope of relevant operating or treatment systems, (D) discharges in compliance with a legally enforceable permit under section 1344 of Title 33, (E) releases in compliance with a legally enforceable final permit issued pursuant to section 3005(a) through (d) of the Solid Waste Disposal Act [42 U.S.C.A 6925(a) to (d)] from a hazardous waste treatment, storage, or disposal facility when such permit specifically identifies the hazardous substances and makes such substances subject to a standard of practice, control procedure or bioassay limitation or condition, or other control on the hazardous substances in such releases, (F) any release in compliance with a legally enforceable permit issued under section 1412 of Title 33 of [1] section 1413 of Title 33, (G) any injection of fluids authorized under Federal underground injection control programs or State programs submitted for Federal approval (and not disapproved by the Administrator of the Environmental Protection Agency) pursuant to part C of the Safe Drinking Water Act [42 U.S.C.A.§ 300h et seq.], (H) any emission into the air subject to a permit or control regulation under section 111 [42 U.S.C.A. § 7411], section 112 [42 U.S.C.A. § 7412], Title I part C [42 U.S.C.A. § 7470 et seq.], Title I part D [42 U.S.C.A. § 7501 et seq.], or State implementation plans submitted in accordance with section 110 of the Clean Air Act [42 U.S.C.A. § 7410] (and not disapproved by the Administra-

tor of the Environmental Protection Agency), including any schedule or waiver granted, promulgated, or approved under these sections, (I) any injection of fluids or other materials authorized under applicable State law (i) for the purpose of stimulating or treating wells for the production of crude oil, natural gas, or water, (ii) for the purpose of secondary, tertiary, or other enhanced recovery of crude oil or natural gas, or (iii) which are brought to the surface in conjunction with the production of crude oil or natural gas and which are reinjected, (J) the introduction of any pollutant into a publicly owned treatment works when such pollutant is specified in and in compliance with applicable pretreatment standards of section 1317(b) or (c) of Title 33 and enforceable requirements in a pretreatment program submitted by a State or municipality for Federal approval under section 1342 of Title 33, and (K) any release of source, special nuclear, or byproduct material, as those terms are defined in the Atomic Energy Act of 1954 [42 U.S.C.A. § 2011 et seq.], in compliance with a legally enforceable license, permit, regulation, or order issued pursuant to the Atomic Energy Act of 1954;

(11) "Fund" or "Trust Fund" means the Hazardous Substance Response Fund established by section 9631 of this title or, in the case of a hazardous waste disposal facility for which liability has been transferred under section 9607(k) of this title, the Post-closure Liability Fund established by section 9641 of this title;

(12) "ground water" means water in a saturated zone or stratum beneath the surface of land or water;

(13) "guarantor" means any person, other than the owner or operator, who provides evidence of financial responsibility for an owner or operator under this chapter;

(14) "hazardous substance" means (A) any substance designated pursuant to section 1321(b)(2)(A) of Title 33, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursu-

ant to section 3001 of the Solid Waste Disposal Act [42 U.S.C.A. § 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C.A. § 6901 et seq.] has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317 (a) of Title 33, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C.A. § 7412], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of Title 15. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas);

(15) "navigable waters" or "navigable waters of the United States" means the waters of the United States, including the territorial seas;

(16) "natural resources" means land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the fishery conservation zone established by the Magnuson Fishery Conservation and Management Act [16 U.S.C.A. § 1801 et seq.]) any State or local government, or any foreign government.

(17) "offshore facility" means any facility of any kind located in, on or under any of the navigable waters of the United States, and any facility of any kind which is subject to the jurisdiction of the United States and is located in, on, or under any other waters, other than a vessel or a public vessel;

(18) "onshore facility" means any facility (including, but not limited to, motor vehicles and rolling stock) of any kind located in, on, or under any land or nonnavigable waters within the United States;

(19) "otherwise subject to the jurisdiction of the United States" means subject to the jurisdiction of the United States by virtue of United States citizenship, United States vessel documentation or numbering, or as provided by international agreement to which the United States is a party;

(20)(A) "owner or operator" means (i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any abandoned facility, any person who owned, operated, or otherwise controlled activities at such facility immediately prior to such abandonment. Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility;

(B) in the case of a hazardous substance which has been accepted for transportation by a common or contract carrier and except as provided in section 9607(a)(3) or (4) of this title, (i) the term "owner or operator" shall mean such common carrier or other bona fide for hire carrier acting as an independent contractor during such transportation, (ii) the shipper of such hazardous substance shall not be considered to have caused or contributed to any release during such transportation which resulted solely from circumstances or conditions beyond his control;

(C) in the case of a hazardous substance which has been delivered by a common or contract carrier to a disposal or treatment facility and except as provided in section 9607(a)(3) or (4) of this title (i) the term "owner or operator" shall not include such common or contract carrier, and (ii) such common or contract carrier shall not be considered to have caused or contributed to any release at such disposal or treatment facility resulting from circumstances or conditions beyond its control;

(21) "person" means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body;

(22) "release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment, but excludes (A) any release which results in exposure to persons soley within a workplace, with respect to a claim which such persons may assert against the employer of such persons, (B) emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, vessel, or pipeline pumping station engine, (C) release of source, byproduct, or special nuclear material from a nuclear incident, as those terms are defined in the Atomic Energy Act of 1954 [42 U.S.C.A. § 2011 et seq.], if such release is subject to requirements with respect to financial protection established by the Nuclear Regulatory Commission under section 170 of such Act [42 U.S.C.A. § 2210], or, for the purposes of section 9604 of this title or any other response action, any release of source byproduct, or special nuclear material from any processing site designated under section 7912(a)(1) or 7942(a) of this title, and (D) the normal application of fertilizer;

(23) "remove" or "removal" means the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary[2] taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, action taken under section 9604(b) of this title, and any emergency assistance which may be provided under the Disaster Relief Act of 1974 [42 U.S.C.A. § 5121 et seq.];

(24) "remedy" or "remedial action" means those actions consistent with permanent remedy taken instead of or in addi-

tion to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The term includes, but is not limited to, such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances or contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment. The term includes the costs of permanent relocation of residents and businesses and community facilities where the President determines that alone or in combination with other measures, such relocation is more cost-effective than and environmentally preferable to the transportation storage, treatment, destruction, or secure disposition offsite of hazardous substances, or may otherwise be necessary to protect the public health or welfare. The term does not include offsite transport of hazardous substances, or the storage, treatment, destruction, or secure disposition offsite of such hazardous substances or contaminated materials unless the President determines that such actions (A) are more cost-effective than other remedial actions, (B) will create new capacity to manage, in compliance with subtitle C of the Solid Waste Disposal Act [42 U.S.C.A. § 6921 et seq.], hazardous substances in addition to those located at the affected facility, or (C) are necessary to protect public health or welfare or the environment from a present or potential risk which may be created by further exposure to the continued presence of such substances or materials;

(25) "respond" or "response" means remove, removal, remedy, and remedial action;

(26) "transport" or "transportation" means the movement of a hazardous substance by any mode, including pipeline (as defined in the Pipeline Safety Act), and in the case of a hazardous substance which has been accepted for transportation by a common or contract carrier, the term "transport" or "transportation" shall include any stoppage in transit which is temporary, incidental to the transportation movement, and at the ordinary operating convenience of a common or contract carrier, and any such stoppage shall be considered as a continuity of movement and not as the storage of a hazardous substance;

(27) "United States" and "State" include the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, the Commonwealth of the Northern Marianas, and any other territory or possession over which the United States has jurisdiction;

(28) "vessel" means every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water;

(29) "disposal", "hazardous waste", and "treatment" shall have the meaning provided in section 1004 of the Solid Waste Disposal Act [42 U.S.C.A. § 6903];

(30) "territorial sea" and "contiguous zone" shall have the meaning provided in section 1362 of Title 33.[3]

(31) "national contingency plan" means the national contingency plan published under section 1321(c) of Title 33 or revised pursuant to section 9605 of this title; and

(32) "liable" or "liability" under this subchapter shall be construed to be the standard of liability which obtains under section 1321 of Title 33.

§ 9602. Designation of additional hazardous substances and establishment of reportable released quantities; regulations

(a) The Administrator shall promulgate and revise as may be appropriate, regulations designating as hazardous substances, in addition to those referred to in section 9601(14) of this title, such elements, compounds, mixtures, solutions, and substances which, when released into the environment may present substantial danger to the public health or welfare or the environment, and shall promulgate regulations establishing that quantity of any hazardous substance the release of which shall be reported pursuant to section 9603 of this title. The Administrator may determine that one single quantity shall be the reportable quantity for any hazardous substance, regardless of the medium into which the hazardous substance is released.

(b) Unless and until superseded by regulations establishing a reportable quantity under subsection (a) of this section for any hazardous substance as defined in section 9601(14) of this title (1) a quantity of one pound, or (2) for those hazardous substances for which reportable quantities have been established pursuant to section 1321(b)(4) of Title 33, such reportable quantity, shall be deemed that quantity, the release of which requires notification pursuant to section 9603(a) or (b) of this title.

§ 9603. Notification requirements respecting released substances

(a) Notice to National Response Center upon release from vessel or offshore or onshore facility by person in charge; conveyance of notice by Center

Any person in charge of a vessel or an offshore or an onshore facility shall, as soon as he has knowledge of any release (other than a federally permitted release) of a hazardous substance from such vessel or facility in quantities equal to or greater than those determined pursuant to section 9602 of this title, immediately notify the National Response Center established under the Clean Water Act [33 U.S.C.A. § 1251 et seq.]

of such release. The National Response Center shall convey the notification expeditiously to all appropriate Government agencies, including the Governor of any affected State.

(b) Penalties for failure to notify; use of notice or information pursuant to notice in criminal case

Any person—

(1) in charge of a vessel from which a hazardous substance is released, other than a federally permitted release, into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or

(2) in charge of a vessel from which a hazardous substance is released, other than a federally permitted release, which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Magnuson Fishery Conservation and Management Act [16 U.S.C.A. § 1801 et seq.]), and who is otherwise subject to the jurisdiction of the United States at the time of the release, or

(3) in charge of a facility from which a hazardous substance is released, other than a federally permitted release, in a quantity equal to or greater than that determined pursuant to section 9602 of this title who fails to notify immediately the appropriate agency of the United States Government as soon as he has knowledge of such release shall, upon conviction, be fined not more than $10,000 or imprisoned for not more than one year, or both. Notification received pursuant to this paragraph or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement.

(c) Notice to Administrator of EPA of existence of storage, etc., facility by owner or operator; exceptions; time, manner, and form of notice; penalties for failure to notify; use of notice or information pursuant to notice in criminal case

Within one hundred and eighty days after December 11, 1980, any person who owns or operates or who at the time of disposal owned or operated, or who accepted hazardous substances for transport and selected, a facility at which hazardous substances (as defined in section 9601(14)(C) of this title) are or have been stored, treated, or disposed of shall, unless such facility has a permit issued under, or has been accorded interim status under, subtitle C of the Solid Waste Disposal Act [42 U.S.C.A. § 6921 et seq.], notify the Administrator of the Environmental Protection Agency of the existence of such facility, specifying the amount and type of any hazardous substance to be found there, and any known, suspected, or likely releases of such substances from such facility. The Administrator may prescribe in greater detail the manner and form of the notice and the information included. The Administrator shall notify the affected State agency, or any department designated by the Governor to receive such notice, of the existence of such facility. Any person who knowingly fails to notify the Administrator of the existence of any such facility shall, upon conviction, be fined not more than $10,000, or imprisoned for not more than one year, or both. In addition, any such person who knowingly fails to provide the notice required by this subsection shall not be entitled to any limitation of liability or to any defenses to liability set out in section 9607 of this title: *Provided, however,* That notification under this subsection is not required for any facility which would be reportable hereunder solely as a result of any stoppage in transit which is temporary, incidental to the transportation movement, or at the ordinary operating convenience of a common or contract carrier, and such stoppage shall be considered as a continuity of movement and not as the storage of a hazardous substance. Notification received pursuant to this sub-

section or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement.

(d) Recordkeeping requirements; promulgation of rules and regulations by Administrator of EPA; penalties for violations; waiver of retention requirements

(1) The Administrator of the Environmental Protection Agency is authorized to promulgate rules and regulations specifying, with respect to—

(A) the location, title, or condition of a facility, and

(B) the identity, characteristics, quantity, origin, or condition (including containerization and previous treatment) of any hazardous substances contained or deposited in a facility;

the records which shall be retained by any person required to provide the notification of a facility set out in subsection (c) of this section. Such specification shall be in accordance with the provisions of this subsection.

(2) Beginning with December 11, 1980, for fifty years thereafter or for fifty years after the date of establishment of a record (whichever is later), or at any such earlier time as a waiver if obtained under paragraph (3) of this subsection, it shall be unlawful for any such person knowingly to destroy, mutilate, erase, dispose of, conceal, or otherwise render unavailable or unreadable or falsify any records identified in paragraph (1) of this subsection. Any person who violates this paragraph shall, upon conviction, be fined not more than $20,000, or imprisoned for not more than one year, or both.

(3) At any time prior to the date which occurs fifty years after December 11, 1980, any person identified under paragraph (1) of this subsection may apply to the Administrator of the Environmental Protection Agency for a waiver of the provisions

of the first sentence of paragraph (2) of this subsection. The Administrator is authorized to grant such waiver if, in his discretion, such waiver would not unreasonably interfere with the attainment of the purposes and provisions of this chapter. The Administrator shall promulgate rules and regulations regarding such a waiver so as to inform parties of the proper application procedure and conditions for approval of such a waiver.

(4) Notwithstanding the provisions of this subsection, the Administrator of the Environmental Protection Agency may in his discretion require any such person to retain any record identified pursuant to paragraph (1) of this subsection for such a time period in excess of the period specified in paragraph (2) of this subsection as the Administrator determines to be necessary to protect the public health or welfare.

(e) Applicability to registered pesticide product

This section shall not apply to the application of a pesticide product registered under the Federal Insecticide, Fungicide, and Rodenticide Act [7 U.S. C.A. § 136 et seq.] or to the handling and storage of such a pesticide product by an agricultural producer.

(f) Exemptions from notice and penalty provisions for substances reported under other Federal law or is in continuous release, etc.

No notification shall be required under subsection (a) or (b) of this section for any release of a hazardous substance—

(1) which is required to be reported (or specifically exempted from a requirement for reporting) under subtitle C of the Solid Waste Disposal Act [42 U.S.C.A. § 6921 et seq.] or regulations thereunder and which has been reported to the National Response Center, or

(2) which is a continuous release, stable in quantity and rate, and is—

(A) from a facility for which notification has been given under subsection (c) of this section, or

(B) a release of which notification has been given under subsections (a) and (b) of this section for a period sufficient to establish the continuity, quantity, and regularity of such release:

Provided, That notification in accordance with subsections (a) and (b) of this paragraph shall be given for releases subject to this paragraph annually, or at such time as there is any statistically significant increase in the quantity of any hazardous substance or constituent thereof released, above that previously reported or occurring.

§ 9604. Response authorities

(a) Removal and other remedial action by President; applicability of national contingency plan; definition

(1) Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time (including its removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment, unless the President determines that such removal and remedial action will be done properly by the owner or operator of the vessel or facility from which the release or threat of release emanates, or by any other responsible party.

(2) For the purposes of this section, "pollutant or contaminant" shall include, but not be limited to, any element, substance, compound, or mixture, including disease-causing agents, which after release into the environment and upon exposure, ingestion, inhalation, or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will or may reasonably be anticipated to cause death, disease, behavioral abnormalities, cancer, genetic mutation, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring. The term does not include petroleum, including crude oil and any fraction thereof which is not otherwise specifically listed or designated as hazardous substances under section 9601(14)(A) through (F) of this title, nor does it include natural gas, liquefied natural gas, or synthetic gas of pipeline quality (or mixtures of natural gas and such synthetic gas).

(b) Investigations, monitoring, etc., by President

Whenever the President is authorized to act pursuant to subsection (a) of this section, or whenever the President has reason to believe that a release has occurred or is about to occur, or that illness, disease, or complaints thereof may be attributable to exposure to a hazardous substance, pollutant, or contaminant and that a release may have occurred or be occurring, he may undertake such investigations, monitoring, surveys, testing, and other information gathering as he may deem necessary or appropriate to identify the existence and extent of the release or threat thereof, the source and nature of the hazardous substances, pollutants or contaminants involved, and the extent of danger to the public health or welfare or to the environment. In addition, the President may undertake such planning, legal, fiscal, economic, engineering, architectural, and other studies or investigations as he may deem necessary or appropriate to plan and direct response actions, to recover the costs thereof, and to enforce the provisions of this chapter.

(c) Criteria for continuance of obligations from Fund over specified amount for response actions; consultation by President with affected States; contracts or cooperative agreements by States with President prior to remedial actions; cost-sharing agreements; selection by President of appropriate remedial actions

(1) Unless (A) the President finds that (i) continued response actions are immediately required to prevent, limit, or mitigate an emergency, (ii) there is an immediate risk to public health or welfare or the environment, and (iii) such assistance will not otherwise be provided on a timely basis, or (B) the President has determined the appropriate remedial actions pursuant to paragraph (2) of this subsection and the State or States in which the source of the release is located have complied with the requirements of paragraph (3) of this subsection, obligations from the Fund, other than those authorized by subsection (b) of this section, shall not continue after $1,000,000 has been obligated for response actions or six months has elapsed from the date of initial response to a release or threatened release of hazardous substances.

(2) The President shall consult with the affected State or States before determining any appropriate remedial action to be taken pursuant to the authority granted under subsection (a) of this section.

(3) The President shall not provide any remedial actions pursuant to this section unless the State in which the release occurs first enters into a contract or cooperative agreement with the President providing assurances deemed adequate by the President that (A) the State will assure all future maintenance of the removal and remedial actions provided for the expected life of such actions as determined by the President; (B) the State will assure the availability of a hazardous waste disposal facility acceptable to the President and in compliance with the requirements of subtitle C of the Solid Waste Disposal Act [42 U.S.C.A. § 6921 et seq.] for any necessary offsite storage,

destruction, treatment, or secure disposition of the hazardous substances; and (C) the State will pay or assure payment of (i) 10 per centum of the costs of the remedial action, including all future maintenance, or (ii) at least 50 per centum or such greater amount as the President may determine appropriate, taking into account the degree of responsibility of the State or political subdivision, of any sums expended in response to a release at a facility that was owned at the time of any disposal of hazardous substances therein by the State or a political subdivision thereof. The President shall grant the State a credit against the share of the costs for which it is responsible under this paragraph for any documented direct out-of-pocket non-Federal funds expended or obligated by the State or a political subdivision thereof after January 1, 1978, and before December 11, 1980, for cost-eligible response actions and claims for damages compensable under section 9611 of this title relating to the specific release in question: *Provided, however,* That in no event shall the amount of the credit granted exceed the total response costs relating to the release.

(4) The President shall select appropriate remedial actions determined to be necessary to carry out this section which are to the extent practicable in accordance with the national contingency plan and which provide for that cost-effective response which provides a balance between the need for protection of public health and welfare and the environment at the facility under consideration, and the availability of amounts from the Fund established under subchapter II of this chapter to respond to other sites which present or may present a threat to public health or welfare or the environment, taking into consideration the need for immediate action.

(d) Contracts or cooperative agreements by President with States or political subdivisions; cost-sharing provisions; enforcement requirements and procedures

(1) Where the President determines that a State or political subdivision thereof has the capability to carry out any or all of the actions authorized in this section, the President may, in

his discretion, enter into a contract or cooperative agreement with such State or political subdivision to take such actions in accordance with criteria and priorities established pursuant to section 9605(8) of this title and to be reimbursed for the reasonable response costs thereof from the Fund. Any contract made hereunder shall be subject to the cost-sharing provisions of subsection (c) of this section.

(2) If the President enters into a cost-sharing agreement pursuant to subsection (c) of this section or a contract or cooperative agreement pursuant to this subsection, and the State or political subdivision thereof fails to comply with any requirements of the contract, the President may, after providing sixty days notice, seek in the appropriate Federal district court to enforce the contract or to recover any funds advanced or any costs incurred because of the breach of the contract by the State or political subdivision.

(3) Where a State or a political subdivision thereof is acting in behalf of the President, the President is authorized to provide technical and legal assistance in the administration and enforcement of any contract or subcontract in connection with response actions assisted under this subchapter, and to intervene in any civil action involving the enforcement of such contract or subcontract.

(4) Where two or more noncontiguous facilities are reasonably related on the basis of geography, or on the basis of the threat, or potential threat to the public health or welfare or the environment, the President may, in his discretion, treat these related facilities as one for purposes of this section.

(e) Access to, and copying of, records relating to covered substances; availability to public of records, reports, and information; procedures applicable

(1) For purposes of assisting in determining the need for response to a release under this subchapter or enforcing the provisions of this subchapter, any person who stores, treats, or

disposes of, or, where necessary to ascertain facts not available at the facility where such hazardous substances are located, who generates, transports, or otherwise handles or has handled, hazardous substances shall, upon request of any officer, employee, or representative of the President, duly designated by the President, or upon request of any duly designated officer, employee, or representative of a State, where appropriate, furnish information relating to such substances and permit such person at all reasonable times to have access to, and to copy all records relating to such substances. For the purposes specified in the preceding sentence, such officers, employees, or representatives are authorized—

(A) to enter at reasonable times any establishment or other place where such hazardous substances are or have been generated, stored, treated, or disposed of, or transported from;

(B) to inspect and obtain samples from any person of any such substance and samples of any containers or labeling for such substances. Each such inspection shall be commenced and completed with reasonable promptness. If the officer, employee, or representative obtains any samples, prior to leaving the premises, he shall give to the owner, operator, or person in charge a receipt describing the sample obtained and if requested a portion of each such sample equal in volume of weight to the portion retained. If any analysis is made of such samples, a copy of the results of such analysis shall be furnished promptly to the owner, operator, or person in charge.

(2)(A) Any records, reports, or information obtained from any person under this section (including records, reports, or information obtained by representatives of the President) shall be available to the public, except that upon a showing satisfactory to the President (or the State, as the case may be) by any person that records, reports, or information, or particular part thereof (other than health or safety effects data), to which the President (or the State, as the case may be) or any officer,

employee, or representative has access under this section if made public would divulge information entitled to protection under section 1905 of Title 18, such information or particular portion thereof shall be considered confidential in accordance with the purposes of that section, except that such record, report, document or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter, or when relevant in any proceeding under this chapter.

(B) Any person not subject to the provisions of section 1905 of Title 18 who knowingly and willfully divulges or discloses any information entitled to protection under this subsection shall, upon conviction, be subject to a fine of not more than $5,000 or to imprisonment not to exceed one year, or both.

(C) In submitting data under this chapter, a person required to provide such data may (i) designate the data which such person believes is entitled to protection under this subsection and (ii) submit such designated data separately from other data submitted under this chapter. A designation under this paragraph shall be made in writing and in such manner as the President may prescribe by regulation.

(D) Notwithstanding any limitation contained in this section or any other provision of law, all information reported to or otherwise obtained by the President (or any representative of the President) under this chapter shall be made available, upon written request of any duly authorized committee of the Congress, to such committee.

(f) Contracts for response actions; compliance with Federal health and safety standards

In awarding contracts to any person engaged in response actions, the President or the State, in any case where it is awarding contracts pursuant to a contract entered into under subsection (d) of this section, shall require compliance with Federal health and safety standards established under section

9651(f) of this title by contractors and subcontractors as a condition of such contracts.

(g) Rates for wages and labor standards applicable to covered work

(1) All laborers and mechanics employed by contractors or subcontractors in the performance of construction, repair, or alteration work funded in whole or in part under this section shall be paid wages at rates not less than those prevailing on projects of a character similar in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act [40 U.S.C.A. § 276a et seq.]. The President shall not approve any such funding without first obtaining adequate assurance that required labor standards will be maintained upon the construction work.

(2) The Secretary of Labor shall have, with respect to the labor standards specified in paragraph (1), the authority and functions set forth in Reorganization Plan Numbered 14 of 1950 (15 F.R. 3176; 64 Stat. 1267) and section 276c of Title 40.

(h) Emergency procurement powers; exercise by President

Notwithstanding any other provision of law, subject to the provisions of section 9611 of this title, the President may authorize the use of such emergency procurement powers as he deems necessary to effect the purpose of this chapter. Upon determination that such procedures are necessary, the President shall promulgate regulations prescribing the circumstances under which such authority shall be used and the procedures governing the use of such authority.

(i) Agency for Toxic Substances and Disease Registry; establishment, functions, etc.

There is hereby established within the Public Health Service an agency, to be known as the Agency for Toxic Substances and Disease Registry, which shall report directly to the Surgeon

General of the United States. The Administrator of said Agency shall, with the cooperation of the Administrator of the Environmental Protection Agency, the Commissioner of the Food and Drug Administration, the Directors of the National Institute of Medicine, National Institute of Environmental Health Sciences, National Institute of Occupational Safety and Health, Centers for Disease Control, the Administrator of the Occupational Safety and Health Administration, and the Administrator of the Social Security Administration, effectuate and implement the health related authorities of this chapter. In addition, said Administrator shall—

(1) in cooperation with the States, establish and maintain a national registry of serious diseases and illnesses and a national registry of persons exposed to toxic substances;

(2) establish and maintain inventory of literature, research, and studies on the health effects of toxic substances;

(3) in cooperation with the States, and other agencies of the Federal Govemment, establish and maintain a complete listing of areas closed to the public or otherwise restricted in use because of toxic substance contamination;

(4) in cases of public health emergencies caused or believed to be caused by exposure to toxic substances, provide medical care and testing to exposed individuals, including but not limited to tissue sampling, chromosomal testing, epidemiological studies, or any other assistance appropriate under the circumstances; and

(5) either independently or as part of other health status survey, conduct periodic survey and screening programs to determine relationships between exposure to toxic substances and illness. In cases of public health emergencies, exposed persons shall be eligible for admission to hospitals and other facilities and services operated or provided by the Public Health Service.

§ 9605. National contingency plan; preparation, contents, etc.

Within one hundred and eighty days after December 11, 1980, the President shall, after notice and opportunity for public comments, revise and republish the national contingency plan for the removal of oil and hazardous substances, originally prepared and published pursuant to section 1321 of Title 33, to reflect and effectuate the responsibilities and powers created by his chapter, in addition to those matters specified in section 1321(c)(2) of Title 33. Such revision shall include a section of the plan to be known as the national hazardous substance response plan which shall establish procedures and standards for responding to releases of hazardous substances, pollutants, and contaminants, which shall include at a minimum:

(1) methods for discovering and investigating facilities at which hazardous substances have been disposed of or otherwise come to be located;

(2) methods for evaluating, including analyses of relative cost, and remedying any releases or threats of releases from facilities which pose substantial danger to the public health or the environment;

(3) methods and criteria for determining the appropriate extent of removal, remedy, and other measures authorized by this chapter;

(4) appropriate roles and responsibilities for the Federal, State, and local governments and for interstate and nongovernmental entities in effectuating the plan;

(5) provision for identification, procurement, maintenance, and storage of response equipment and supplies;

(6) a method for and assignment of responsibility for reporting the existence of such facilities which may be located on federally owned or controlled properties and any releases of hazardous substances from such facilities;

(7) means of assuring that remedial action measures are cost-effective over the period of potential exposure to the hazardous substances or contaminated materials;

(8)(A) criteria for determining priorities among releases or threatened releases throughout the United States for the purpose of taking remedial action and, to the extent practicable taking into account the potential urgency of such action, for the purpose of taking removal action. Criteria and priorities under this paragraph shall be based upon relative risk or danger to public health or welfare or the environment, in the judgment of the President, taking into account to the extent possible the population at risk, the hazard potential of the hazardous substances at such facilities, the potential for contamination of drinking water supplies, the potential for direct human contact, the potential for destruction of sensitive ecosystems, State preparedness to assume State costs and responsibilities, and other appropriate factors;

(B) based upon the criteria set forth in subparagraph (A) of this paragraph, the President shall list as part of the plan national priorities among the known releases or threatened releases throughout the United States and shall revise the list no less often than annually. Within one year after December 11, 1980, and annually thereafter, each State shall establish and submit for consideration by the President priorities for remedial action among known releases and potential releases in that State based upon the criteria set forth in subparagraph (A) of this paragraph. In assembling or revising the national list, the President shall consider any priorities established by the States. To the extent practicable, at least four hundred of the highest priority facilities shall be designated individually and shall be referred to as the "top priority among known response targets", and, to the extent practicable, shall include among the one hundred highest priority facilities at least one such facility from each State which shall be the facility designated by the State as presenting the greatest danger to pub-

lic health or welfare or the environment among the known facilities in such State. Other priority facilities or incidents may be listed singly or grouped for response priority purposes; and

(9) specified roles for private organizations and entities in preparation for response and in responding to releases of hazardous substances, including identification of appropriate qualifications and capacity therefor.

The plan shall specify procedures, techniques, materials, equipment, and methods to be employed in identifying, removing, or remedying releases of hazardous substances comparable to those required under section 1321(c)(2) (F) and (G) and (j)(1) of Title 33. Following publication of the revised national contingency plan, the response to and actions to minimize damage from hazardous substances releases shall, to the greatest extent possible, be in accordance with the provisions of the plan. The President may, from time to time, revise and republish the national contingency plan.

§ 9606. Abatement actions

(a) Maintenance, jurisdiction, etc.

In addition to any other action taken by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require. The President may also, after notice to the affected State take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.

(b) Fines

Any person who willfully violates, or fails or refuses to comply with, any order of the President under subsection (a) of this section may, in an action brought in the appropriate United States district court to enforce such order, be fined not more than $5,000 for each day in which such violation occurs or such failure to comply continues.

(c) Guidelines for using imminent hazard, enforcement, and emergency response authorities; promulgation by Administrator of EPA, scope, etc.

Within one hundred and eighty days after December 11, 1980, the Administrator of the Environmental Protection Agency shall, after consultation with the Attorney General, establish and publish guidelines for using the imminent hazard, enforcement, and emergency response authorities of this section and other existing statutes administered by the Administrator of the Environmental Protection Agency to effectuate the responsibilities and powers created by this chapter. Such guidelines shall to the extent practicable be consistent with the national hazardous substance response plan, and shall include, at a minimum, the assignment of responsibility for coordinating response actions with the issuance of administrative orders, enforcement of standards and permits, the gathering of information, and other imminent hazard and emergency powers authorized by (1) sections 1321(c)(2), 1318, 1319, and 1364(a) of Title 33, (2) sections 6927, 6928, 6934, and 6973 of this title, (3) sections 300j–4 and 300i of this title, (4) sections 7413, 7414, and 7603 of this title, and (5) section 2606 of Title 15.

§ 9607. Liability

(a) Covered persons; scope

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel (otherwise subject to the jurisdiction of the United States) or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; and

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release.

(b) Defenses

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a

hazardous substance and the damages resulting therefrom were caused solely by—

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(4) any combination of the foregoing paragraphs.

(c) Determination of amounts

(1) Except as provided in paragraph (2) of this subsection, the liability under this section of an owner or operator or other responsible person for each release of a hazardous substance or incident involving release of a hazardous substance shall not exceed—

(A) for any vessel which carries any hazardous substance as cargo or residue, $300 per gross ton, or $5,000,000, whichever is greater;

(B) for any other vessel, $300 per gross ton, or $500,000, whichever is greater;

(C) for any motor vehicle, aircraft, pipeline (as defined in the Hazardous Liquid Pipeline Safety Act of

1979 [49 U.S.C.A. § 2001 et seq.]), or rolling stock, $50,000,000 or such lesser amount as the President shall establish by regulation, but in no event less than $5,000,000 (or, for releases of hazardous substances as defined in section 9601(14) (A) of this title into the navigable waters, $8,000,000). Such regulations shall take into account the size, type, location, storage, and handling capacity and other matters relating to the likelihood of release in each such class and to the economic impact of such limits on each such class; or

(D) for any facility other than those specified in subparagraph (C) of this paragraph, the total of all costs of response plus $50,000,000 for any damages under this subchapter.

(2) Notwithstanding the limitations in paragraph (1) of this subsection, the liability of an owner or operator or other responsible person under this section shall be the full and total costs of response and damages, if (A)(i) the release or threat of release of a hazardous substance was the result of willful misconduct or willful negligence within the privity or knowledge of such person, or (ii) the primary cause of the release was a violation (within the privity or knowledge of such person) of applicable safety, construction, or operating standards or regulations; or (B) such person fails or refuses to provide all reasonable cooperation and assistance requested by a responsible public official in connection with response activities under the national contingency plan with respect to regulated carriers subject to the provisions of Title 49 or vessels subject to the provisions of Title 33 or 46, subparagraph (A)(ii) of this paragraph shall be deemed to refer to Federal standards or regulations.

(3) If any person who is liable for a release or threat of release of a hazardous substance fails without sufficient cause to properly provide removal or remedial action upon order of the President pursuant to section 9604 or 9606 of this title, such person may be liable to the United States for punitive damages in an amount at least equal to, and not more than three times, the

amount of any costs incurred by the Fund as a result of such failure to take proper action. The President is authorized to commence a civil action against any such person to recover the punitive damages, which shall be in addition to any costs recovered from such person pursuant to section 9612(c) of this title. Any moneys received by the United States pursuant to this subsection shall be deposited in the Fund.

(d) Activities pursuant to national contingency plan

No person shall be liable under this subchapter for damages as a result of actions taken or omitted in the course of rendering care, assistance, or advice in accordance with the national contingency plan or at the direction of an onscene coordinator appointed under such plan, with respect to an incident creating a danger to public health or welfare or the environment as a result of any release of a hazardous substance or the threat thereof. This subsection shall not preclude liability for damages as the result of gross negligence or intentional misconduct on the part of such person. For the purposes of the preceding sentence, reckless, willful, or wanton misconduct shall constitute gross negligence.

(e) Indemnification, hold harmless, etc., agreements or conveyances; subrogation rights

(1) No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.

(2) Nothing in this subchapter, including the provisions of paragraph (1) of this subsection, shall bar a cause of action that an owner or operator or any other person subject to liability

under this section, or a guarantor, has or would have, by reason of subrogation or otherwise against any person.

(f) Actions involving natural resources; maintenance, scope, etc.

In the case of an injury to, destruction of, or loss of natural resources under subparagraph (C) of subsection (a) of this section liability shall be to the United States Government and to any State for natural resources within the State or belonging to, managed by, controlled by, or appertaining to such State: *Provided, however*, That no liability to the United States or State shall be imposed under subparagraph (C) of subsection (a) of this section, where the party sought to be charged has demonstrated that the damages to natural resources complained of were specifically identified as an irreversible and irretrievable commitment of natural resources in an environmental impact statement, or other comparable environment analysis, and the decision to grant a permit or license authorizes such commitment of natural resources, and the facility or project was otherwise operating within the terms of its permit or license. The President, or the authorized representative of any State, shall act on behalf of the public as trustee of such natural resources to recover for such damages. Sums recovered shall be available for use to restore, rehabilitate, or acquire the equivalent of such natural resources by the appropriate agencies of the Federal Government or the State government, but the measure of such damages shall not be limited by the sums which can be used to restore or replace such resources. There shall be no recovery under the authority of subparagraph (C) of subsection (a) of this section where such damages and the release of a hazardous substance from which such damages resulted have occurred wholly before December 11, 1980.

(g) Applicability to Federal Government branches

Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Govern-

ment shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under this section.

(h) Owner or operator of vessel

The owner or operator of a vessel shall be liable in accordance with this section and as provided under section 9614 of this title notwithstanding any provision of the Act of March 3, 1851 (46 U.S.C. 183ff).

(i) Application of registered pesticide product

No person (including the United States or any State) may recover under the authority of this section for any response costs or damages resulting from the application of a pesticide product registered under the Federal Insecticide, Fungicide, and Rodenticide Act [7 U.S.C.A. § 136 et seq.]. Nothing in this paragraph shall affect or modify in any way the obligations or liability of any person under any other provision of State or Federal law, including common law, for damages, injury, or loss resulting from a release of any hazardous substance or for removal or remedial action or the costs of removal or remedial action of such hazardous substance.

(j) Obligations or liability pursuant to federally permitted release

Recovery by any person (including the United States or any State) for response costs or damages resulting from a federally permitted release shall be pursuant to existing law in lieu of this section. Nothing in this paragraph shall affect or modify in any way the obligations or liability of any person under any other provision of State or Federal law, including common law, for damages, injury, or loss resulting from a release of any hazardous substance or for removal or remedial action or the costs of removal or remedial action of such hazardous substance. In

addition, costs of response incurred by the Federal Government in connection with a discharge specified in section 9601(10)(B) or (C) of this title shall be recoverable in an action brought under section 1319(b) of Title 33.

(k) Transfer to, and assumption by, Post-closure Liability Fund of liability of owner or operator of hazardous waste disposal facility in receipt of permit under applicable solid waste disposal law; time, criteria applicable, procedures, etc.; monitoring costs; reports

(1) The liability established by this section or any other law for the owner or operator of a hazardous waste disposal facility which has received a permit under subtitle C of the Solid Waste Disposal Act [42 U.S.C.A.§ 6921 et seq.], shall be transferred to and assumed by the Post-closure Liability Fund established by section 9641 of this title when—

(A) such facility and the owner and operator thereof has complied with the requirements of subtitle C of the Solid Waste Disposal Act [42 U.S.C.A.§ 6921 et seq.] and regulations issued thereunder, which may affect the performance of such facility after closure; and

(B) such facility has been closed in accordance with such regulations and the conditions of such permit, and such facility and the surrounding area have been monitored as required by such regulations and permit conditions for a period not to exceed five years after closure to demonstrate that there is no substantial likelihood that any migration offsite or release from confinement of any hazardous substance or other risk to public health or welfare will occur.

(2) Such transfer of liability shall be effective ninety days after the owner or operator of such facility notifies the Administrator of the Environmental Protection Agency (and the State where it has an authorized program under section 3006(b) of the Solid Waste Disposal Act [42 U.S.C.A. § 6926(b)]) that the conditions imposed by this subsection have been satisfied. If

within such ninety-day period the Administrator of the Environmental Protection Agency or such State determines that any such facility has not complied with all the conditions imposed by this subsection or that insufficient information has been provided to demonstrate such compliance, the Administrator or such State shall so notify the owner and operator of such facility and the administrator of the Fund established by section 9641 of this title, and the owner and operator of such facility shall continue to be liable with respect to such facility under this section and other law until such time as the Administrator and such State determines that such facility has complied with all conditions imposed by this subsection. A determination by the Administrator or such State that a facility has not complied with all conditions imposed by this subsection or that insufficient information has been supplied to demonstrate compliance, shall be a final administrative action for purposes of judicial review. A request for additional information shall state in specific terms the data required.

(3) In addition to the assumption of liability of owners and operators under paragraph (1) of this subsection, the Post-closure Liability Fund established by section 9641 of this title may be used to pay costs of monitoring and care and maintenance of a site incurred by other persons after the period of monitoring required by regulations under subtitle C of the Solid Waste Disposal Act [42 U.S.C.A. § 6921 et seq.] for hazardous waste disposal facilities meeting the conditions of paragraph (1) of this subsection.

(4)(A) Not later than one year after December 11, 1980, the Secretary of the Treasury shall conduct a study and shall submit a report thereon to the Congress on the feasibility of establishing or qualifying an optional system of private insurance for postclosure financial responsibility for hazardous waste disposal facilities to which this subsection applies. Such study shall include a specification of adequate and realistic minimum standards to assure that any such privately placed insurance will carry out the purposes of this subsection in a reliable, enforceable, and practical manner. Such a study shall include an

examination of the public and private incentives, programs, and actions necessary to make privately placed insurance a practical and effective option to the financing system for the Post-closure Liability Fund provided in subchapter II of this chapter.

(B) Not later than eighteen months after December 11, 1980, and after a public hearing, the President shall by rule determine whether or not it is feasible to establish or qualify an optional system of private insurance for postclosure financial responsibility for hazardous waste disposal facilities to which this subsection applies. If the President determines the establishment or qualification of such a system would be infeasible, he shall promptly publish an explanation of the reasons for such a determination. If the President determines the establishment or qualification of such a system would be feasible, he shall promptly publish notice of such determination. Not later than six months after an affirmative determination under the preceding sentence and after a public hearing, the President shall by rule promulgate adequate and realistic minimum standards which must be met by any such privately placed insurance, taking into account the purposes of this chapter and this subsection. Such rules shall also specify reasonably expeditious procedures by which privately placed insurance plans can qualify as meeting such minimum standards.

(C) In the event any privately placed insurance plan qualifies under subparagraph (B), any person enrolled in, and complying with the terms of, such plan shall be excluded from the provisions of paragraphs (1), (2), and (3) of this subsection and exempt from the requirements to pay any tax or fee to the Post-closure Liability Fund under subchapter II of this chapter.

(D) The President may issue such rules and take such other actions as are necessary to effectuate the purposes of this paragraph.

§ 9608. Financial responsibility

(a) Establishment and maintenance by owner or operator of vessel; amount; failure to obtain certification of compliance

(1) The owner or operator of each vessel (except a nonself-propelled barge that does not carry hazardous substances as cargo) over three hundred gross tons that uses any port or place in the United States or the navigable waters or any offshore facility, shall establish and maintain, in accordance with regulations promulgated by the President, evidence of financial responsibility of $300 per gross ton (or for a vessel carrying hazardous substances as cargo, or $5,000,000, whichever is greater). Financial responsibility may be established by any one, or any combination, of the following: insurance, guarantee, surety bond, or qualification as a self-insurer. Any bond filed shall be issued by a bonding company authorized to do business in the United States. In cases where an owner or operator owns, operates, or charters more than one vessel subject to this subsection, evidence of financial responsibility need be established only to meet the maximum liability applicable to the largest of such vessels.

(2) The Secretary of the Treasury shall withhold or revoke the clearance required by section 91 of Title 46 of any vessel subject to this subsection that does not have certification furnished by the President that the financial responsibility provisions of paragraph (1) of this subsection have been complied with.

(3) The Secretary of Transportation, in accordance with regulations issued by him, shall (A) deny entry to any port or place in the United States or navigable waters to, and (B) detain at the port or place in the United States from which it is about to depart for any other port or place in the United States, any vessel subject to this subsection that, upon request, does not produce certification furnished by the President that the financial responsibility provisions of paragraph (1) of this subsection have been complied with.

(b) Establishment and maintenance by owner or operator of production, etc., facilities; amount; adjustment; consolidated form of responsibility; coverage of motor carriers

(1) Beginning not earlier than five years after December 11, 1980, the President shall promulgate requirements (for facilities in addition to those under subtitle C of the Solid Waste Disposal Act [42 U.S.C.A. § 6921 et seq.] and other Federal law) that classes of facilities establish and maintain evidence of financial responsibility consistent with the degree and duration of risk associated with the production, transportation, treatment, storage, or disposal of hazardous substances. Not later than three years after December 11, 1980, the President shall identify those classes for which requirements will be first developed and publish notice of such identification in the Federal Register. Priority in the development of such requirements shall be accorded to those classes of facilities, owners, and operators which the President determines present the highest level of risk of injury.

(2) The level of financial responsibility shall be initially established, and, when necessary, adjusted to protect against the level of risk which the President in his discretion believes is appropriate based on the payment experience of the Fund, commercial insurers, courts settlements and judgments, and voluntary claims satisfaction. To the maximum extent practicable, the President shall cooperate with and seek the advice of the commercial insurance industry in developing financial responsibility requirements.

(3) Regulations promulgated under this subsection shall incrementally impose financial responsibility requirements over a period of not less than three and no more than six years after the date of promulgation. Where possible, the level of financial responsibility which the President believes appropriate as a final requirement shall be achieved through incremental, annual increases in the requirements.

(4) Where a facility is owned or operated by more than one person, evidence of financial responsibility covering the facility may be established and maintained by one of the owners or operators, or, in consolidated form, by or on behalf of two or more owners or operators. When evidence of financial responsibility is established in a consolidated form, the proportional share of each participant shall be shown. The evidence shall be accompanied by a statement authorizing the applicant to act for and in behalf of each participant in submitting and maintaining the evidence of financial responsibility.

(5) The requirements for evidence of financial responsibility for motor carriers covered by this chapter shall be determined under section 30 of the Motor Carrier Act of 1980, Public Law 96-296.

(c) Claims against guarantor; maintenance, etc.

Any claim authorized by section 9607 or 9611 of this title may be asserted directly against any guarantor providing evidence of financial responsibility as required under this section. In defending such a claim, the guarantor may invoke all rights and defenses which would be available to the owner or operator under this subchapter. The guarantor may also invoke the defense that the incident was caused by the willful misconduct of the owner or operator, but such guarantor may not invoke any other defense that such guarantor might have been entitled to invoke in a proceeding brought by the owner or operator against him.

(d) Liability of guarantor

Any guarantor acting in good faith against which claims under this chapter are asserted as a guarantor shall be liable under section 9607 of this title or section 9612(c) of this title only up to the monetary limits of the policy of insurance or indemnity contract such guarantor has undertaken or of the guaranty of other evidence of financial responsibility furnished under this section, and only to the extent that liability is not excluded by restrictive endorsement: *Provided,* That this subsection shall not alter the liability of any person under section 9607 of this title.

§ 9609. Civil penalties

Any person who, after notice and an opportunity for a hearing, is found to have failed to comply with the requirements of section 9608 of this title, the regulations issued thereunder, or with any denial or detention order shall be liable to the United States for a civil penalty, not to exceed $10,000 for each day of violation.

§ 9610. Employee protection

(a) Activities of employee subject to protection

No person shall fire or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has provided information to a State or to the Federal Government, filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.

(b) Administrative grievance procedure in cases of alleged violations

Any employee or a representative of employees who believes that he has been fired or otherwise discriminated against by any person in violation of subsection (a) of this section may, within thirty days after such alleged violation occurs, apply to the Secretary of Labor for a review of such firing or alleged discrimination. A copy of the application shall be sent to such person, who shall be the respondent. Upon receipt of such application, the Secretary of Labor shall cause such investigation to be made as he deems appropriate. Such investigation shall provide an opportunity for a public hearing at the request of any party to such review to enable the parties to present information relating to such alleged violation. The parties shall be given written notice of the time and place of the hearing at least five days prior to the hearing. Any such hearing shall be of record and shall be subject to section 554 of Title 5. Upon receiving the report of such investigation, the Secretary of Labor shall make findings of fact. If he finds that such violation did occur, he shall issue a decision, incorporating an order therein and his findings, requiring the party committing such violation to take such affirmative action to abate the violation as the Secretary of Labor deems appropriate, including, but not limited to, the rehiring or reinstatement of the employee or representative of employees to his former

position with compensation. If he finds that there was no such violation, he shall issue an order denying the application. Such order issued by the Secretary of Labor under this subparagraph shall be subject to judicial review in the same manner as orders and decisions are subject to judicial review under this chapter.

(c) Assessment of costs and expenses against violator subsequent to issuance of order of abatement

Whenever an order is issued under this section to abate such violation, at the request of the applicant a sum equal to the aggregate amount of all costs and expenses (including the attorney's fees) determined by the Secretary of Labor to have been reasonably incurred by the applicant for, or in connection with, the institution and prosecution of such proceedings, shall be assessed against the person committing such violation.

(d) Defenses

This section shall have no application to any employee who acting without discretion from his employer (or his agent) deliberately violates any requirement of this chapter.

(e) Presidential evaluations of potential loss of shifts of employment resulting from administration or enforcement of provisions; investigations; procedures applicable, etc.

The President shall conduct continuing evaluations of potential loss of shifts of employment which may result from the administration or enforcement of the provisions of this chapter, including, where appropriate, investigating threatened plant closures or reductions in employment allegedly resulting from such administration or enforcement. Any employee who is discharged, or laid off, threatened with discharge or layoff, or otherwise discriminated against by any person because of the alleged results of such administration or enforcement, or any representative of such employee, may request the President to conduct a full investigation of the matter and, at the request of

any party, shall hold public hearings, require the parties, including the employer involved, to present information relating to the actual or potential effect of such administration or enforcement on employment and any alleged discharge, layoff, or other discrimination, and the detailed reasons or justification therefore. Any such hearing shall be of record and shall be subject to section 554 of Title 5. Upon receiving the report of such investigation, the President shall make findings of fact as to the effect of such administration or enforcement on employment and on the alleged discharge, layoff, or discrimination and shall make such recommendations as he deems appropriate. Such report, findings, and recommendations shall be available to the public. Nothing in this subsection shall be construed to require or authorize the President or any State to modify or withdraw any action, standard, limitation, or any other requirement of this chapter.

§ 9611. Uses of Fund

(a) Authorized purposes

The President shall use the money in the Fund for the following purposes:

(1) payment of governmental response costs incurred pursuant to section 9604 of this title, including costs incurred pursuant to the Intervention on the High Seas Act [33 U.S.C.A. § 1471 et seq.];

(2) payment of any claim for necessary response costs incurred by any other person as a result of carrying out the national contingency plan established under section 1321(c) of Title 33 and amended by section 9605 of this title: *Provided, however,* That such costs must be approved under said plan and certified by the responsible Federal official;

(3) payment of any claim authorized by subsection (b) of this section and finally decided pursuant to section 9612 of this title, including those costs set out in subsection 9612(c)(3) of this title; and

(4) payment of costs specified under subsection (c) of this section.

The President shall not pay for any administrative costs or expenses out of the Fund unless such costs and expenses are reasonably necessary for and incidental to the implementation of this subchapter.

(b) Additional authorized purposes

Claims asserted and compensable but unsatisfied under provisions of section 1321 of Title 33, which are modified by section 304 of this Act may be asserted against the Fund under this subchapter; and other claims resulting from a release or threat of release of a hazardous substance from a vessel or a facility may be asserted against the Fund under this subchapter for injury to, or destruction or loss of, natural resources, including cost for damage assessment: *Provided, however,* That any such claim may be asserted only by the President, as trustee, for natural resources over which the United States has sovereign rights, or natural resources within the territory or the fishery conservation zone of the United States to the extent they are managed or protected by the United States, or by any State for natural resources within the boundary of that State belonging to, managed by, controlled by, or appertaining to the State.

(c) Peripheral matters and limitations

Uses of the Fund under subsection (a) of this section include—

(1) the costs of assessing both short-term and long-term injury to, destruction of, or loss of any natural resources resulting from a release of a hazardous substance;

(2) the costs of Federal or State efforts in the restoration, rehabilitation, or replacement or acquiring the equivalent of any natural resources injured, destroyed, or lost as a result of a release of a hazardous substance;

(3) subject to such amounts as are provided in appropriation Acts, the costs of a program to identify, investigate,

and take enforcement and abatement action against releases of hazardous substances;

(4) the costs of epidemiologic studies, development and maintenance of a registry of persons exposed to hazardous substances to allow long-term health effect studies, and diagnostic services not otherwise available to determine whether persons in populations exposed to hazardous substances in connection with a release or a suspected release are suffering from long-latency diseases;

(5) subject to such amounts as are provided in appropriation Acts, the costs of providing equipment and similar overhead, related to the purposes of this chapter and section 1321 of Title 33, and needed to supplement equipment and services available through contractors or other non-Federal entities, and of establishing and maintaining damage assessment capability, for any Federal agency involved in strike forces, emergency task forces, or other response teams under the national contingency plan; and

(6) subject to such amounts as are provided in appropriation Acts, the costs of a program to protect the health and safety of employees involved in response to hazardous substance releases. Such program shall be developed jointly by the Environmental Protection Agency, the Occupational Safety and Health Administration, and the National Institute for Occupational Safety and Health and shall include, but not be limited to, measures for identifying and assessing hazards to which persons engaged in removal, remedy, or other response to hazardous substances may be exposed, methods to protect workers from such hazards, and necessary regulatory and enforcement measures to assure adequate protection of such employees.

(d) Additional limitations

(1) No money in the Fund may be used under subsection (c)(1) and (2) of this section, nor for the payment of any claim under subsection (b) of this section, where the injury, destruction, or loss of natural resources and the release of a hazardous

substance from which such damages resulted have occurred wholly before December 11, 1980.

(2) No money in the Fund may be used for the payment of any claim under subsection (b) of this section where such expenses are associated with injury or loss resulting from long-term exposure to ambient concentrations of air pollutants from multiple or diffuse sources.

(e) Funding requirements respecting moneys in Fund

(1) Claims against or presented to the Fund shall not be valid or paid in excess of the total money in the Fund at any one time. Such claims become valid only when additional money is collected, appropriated, or otherwise added to the Fund. Should the total claims outstanding at any time exceed the current balance of the Fund, the President shall pay such claims, to the extent authorized under this section, in full in the order in which they were finally determined.

(2) In any fiscal year, 85 percent of the money credited to the Fund under subchapter II of this chapter shall be available only for the purposes specified in paragraphs (1), (2), and (4) of subsection (a) of this section.

(3) No money in the Fund shall be available for remedial action, other than actions specified in subsection (c) of this section, with respect to federally owned facilities.

(4) Paragraphs (1) and (4) of subsection (a) of this section shall in the aggregate be subject to such amounts as are provided in appropriation Acts.

(f) Obligation of moneys by Federal officials; obligation of moneys or settlement of claims by State officials

The President is authorized to promulgate regulations designating one or more Federal officials who may obligate money in the Fund in accordance with this section or portions thereof. The President is also authorized to delegate authority to obligate money in the Fund or to settle claims to officials of a State operating under a contract or cooperative agreement with

the Federal Government pursuant to section 9604(d) of this title.

(g) Notice to potential injured parties by owner and operator of vessel or facility causing release of substance; rules and regulations

The President shall provide for the promulgation of rules and regulations with respect to the notice to be provided to potential injured parties by an owner and operator of any vessel, or facility from which a hazardous substance has been released. Such rules and regulations shall consider the scope and form of the notice which would be appropriate to carry out the purposes of this subchapter. Upon promulgation of such rules and regulations, the owner and operator of any vessel or facility from which a hazardous substance has been released shall provide notice in accordance with such rules and regulations. With respect to releases from public vessels, the President shall provide such notification as is appropriate to potential injured parties. Until the promulgation of such rules and regulations, the owner and operator of any vessel or facility from which a hazardous substance has been released shall provide reasonable notice to potential injured parties by publication in local newspapers serving the affected area.

(h) Assessment of damages for injury, etc., to natural resources from release of substances; determination, etc.

(1) In accordance with regulations promulgated under section 9651(c) of this title, damages for injury to, destruction of, or loss of natural resources resulting from a release of a hazardous substance, for the purposes of this chapter and section 1321(f)(4) and (5) of Title 33, shall be assessed by Federal officials designated by the President under the national contingency plan published under section 9605 of this title, and such officials shall act for the President as trustee under this section and section 1321(f)(5) of Title 33.

(2) Any determination or assessment of damages for injury to, destruction of, or loss of natural resources for the purposes of this chapter and section 1321(f)(4) and (5) of Title 33 shall have the force and effect of a rebuttable presumption on behalf of any claimant (including a trustee under section 9607 of this title or a Federal agency) in any judicial or adjudicatory administrative proceeding under this chapter or section 1321 of Title 33.

(i) Restoration, etc., of natural resources

Except in a situation requiring action to avoid an irreversible loss of natural resources or to prevent or reduce any continuing danger to natural resources or similar need for emergency action, funds may not be used under this chapter for the restoration, rehabilitation, or replacement or acquisition of the equivalent of any natural resources until a plan for the use of such funds for such purposes has been developed and adopted by affected Federal agencies and the Governor or Governors of any State having sustained damage to natural resources within its borders, belonging to, managed by or appertaining to such State, after adequate public notice and opportunity for hearing and consideration of all public comment.

(j) Use of Post-closure Liability Fund

The President shall use the money in the Post-closure Liability Fund for any of the purposes specified in subsection (a) of this section with respect to a hazardous waste disposal facility for which liability has transferred to such fund under section 9607(k) of this title, and, in addition, for payment of any claim or appropriate request for costs of response, damages, or other compensation for injury or loss under section 9607 of this title or any other State or Federal law, resulting from a release of a hazardous substance from such a facility.

(k) Audit review, etc., by Inspector General of Federal department or agency delegated with responsibility to obligate moneys

The Inspector General of each department or agency to which responsibility to obligate money in the Fund is delegated

shall provide an audit review team to audit all payments, obligations, reimbursements, or other uses of the Fund, to assure that the Fund is being properly administered and that claims are being appropriately and expeditiously considered. Each such Inspector General shall submit to the Congress an interim report one year after the establishment of the Fund and a final report two years after the establishment of the Fund. Each such Inspector General shall thereafter provide such auditing of the Fund as is appropriate. Each Federal agency shall cooperate with the Inspector General in carrying out this subsection.

(l) Foreign claimants

To the extent that the provisions of this chapter permit, a foreign claimant may assert a claim to the same extent that a United States claimant may assert a claim if—

(1) the release of a hazardous substance occurred (A) in the navigable waters or (B) in or on the territorial sea or adjacent shoreline of a foreign country of which the claimant is a resident;

(2) the claimant is not otherwise compensated for his loss;

(3) the hazardous substance was released from a facility or from a vessel located adjacent to or within the navigable waters or was discharged in connection with activities conducted under the Outer Continental Shelf Lands Act, as amended (43 U.S.C. 1331 et seq.) or the Deepwater Port Act of 1974, as amended (33 U.S.C. 1501 et seq.); and

(4) recovery is authorized by a treaty or an executive agreement between the United States and foreign country involved, or if the Secretary of State, in consultation with the Attorney General and other appropriate officials, certifies that such country provides a comparable remedy for United States claimants.

§ 9612. Claims procedure

(a) Presentment of assertable claims against owner, operator, guarantor, or other person; election of available remedies upon failure to satisfy presentment

All claims which may be asserted against the Fund pursuant to section 9611 of this title shall be presented in the first instance to the owner, operator, or guarantor of the vessel or facility from which a hazardous substance has been released, if known to the claimant, and to any other person known to the claimant who may be liable under section 9607 of this title. In any case where the claim has not been satisfied within sixty days of presentation in accordance with this subsection, the claimant may elect to commence an action in court against such owner, operator, guarantor, or other person or to present the claim to the Fund for payment.

(b) Forms and procedures applicable

(1) The President shall prescribe appropriate forms and procedures for claims filed hereunder, which shall include a provision requiring the claimant to make a sworn verification of the claim to the best of his knowledge. Any person who knowingly gives or causes to be given any false information as a part of any such claim shall, upon conviction, be fined up to $5,000 or imprisoned for not more than one year, or both.

(2)(A) Upon receipt of any claim, the President shall as soon as practicable inform any known affected parties of the claim and shall attempt to promote and arrange a settlement between the claimant and any person who may be liable. If the claimant and alleged liable party or parties can agree upon a settlement, it shall be final and binding upon the parties thereto, who will be deemed to have waived all recourse against the Fund.

(B) Where a liable party is unknown or cannot be determined, the claimant and the President shall attempt to arrange settlement of any claim against the Fund. The President is authorized to award and make payment of such a settlement,

subject to such proof and procedures as he may promulgate by regulation.

(C) Except as provided in subparagraph (D) of this paragraph, the President shall use the facilities and services of private insurance and claims adjusting organizations or State agencies in implementing this subsection and may contract to pay compensation for those facilities and services. Any contract made under the provisions of this paragraph may be made without regard to the provisions of section 5 of Title 41, upon a showing by the President that advertising is not reasonably practicable. When the services of a State agency are used hereunder, no payment may be made on a claim asserted on behalf of that State or any of its agencies or subdivisions unless the payment has been approved by the President.

(D) To the extent necessitated by extraordinary circumstances, where the services of such private organizations or State agencies are inadequate, the President may use Federal personnel to implement this subsection.

(3) If no settlement is reached within forty-five days of filing of a claim through negotiation pursuant to this section, the President may, if he is satisfied that the information developed during the processing of the claim warrants it, make and pay an award of the claim. If the claimant is dissatisfied with the award, he may appeal it in the manner provided for in subparagraph (G) of paragraph (4) of this subsection. If the President declines to make an award, he shall submit the claim for decision to a member of the Board of Arbitrators established pursuant to paragraph (4).

(4)(A) Within ninety days of December 11, 1980, the President shall establish a Board of Arbitrators to implement this subsection. The Board shall consist of as many members as the President may determine will be necessary to implement this subsection expeditiously, and he may increase or decrease the size of the Board at any time in his discretion in order to enable it to respond to the demands of such implementation. Each

member of the Board shall be selected through utilization of the procedures of the American Arbitration Association: *Provided, however*, That no regular employee of the President or any of the Federal departments, administrations, or agencies to whom he delegated responsibilities under this chapter shall act as a member of the Board.

(B) Hearings conducted hereunder shall be public and shall be held in such place as may be agreed upon by the parties thereto, or, in the absence of such agreement, in such place as the President determines, in his discretion, will be most convenient for the parties thereto.

(C) Hearings before a member of the Board shall be informal, and the rules of evidence prevailing in judicial proceedings need not be required. Each member of the Board shall have the power to administer oaths and to subpena the attendance and testimony of witnesses and the production of books, records, and other evidence relative or pertinent to the issues presented to him for decision. Testimony may be taken by interrogatory or deposition. Each person appearing before a member of the Board shall have the right to counsel. Subpenas shall be issued and enforced in accordance with procedures in subsection (d) of section 555 of Title 5, and rules promulgated by the President. If a person fails or refuses to obey a subpena, the President may invoke the aid of the district court of the United States where the person is found , resides, or transacts business in requiring the attendance and testimony of the person and the production by him of books, papers, documents, or any tangible things.

(D) In any proceeding before a member of the Board, the claimant shall bear the burden of proving his claim. Should a member of the Board determine that further investigations, monitoring, surveys, testing, or other information gathering would be useful and necessary in deciding the claim, he may request the President in writing to undertake such activities pursuant to section 9604(b) of this title. The President shall dispose of such a request in his sole discretion, taking into account

various competing demands and the availability of the technical and financial capacity to conduct such studies, monitoring, and investigations. Should the President decide to undertake the requested actions, all time requirements for the processing and deciding of claims hereunder shall be suspended until the President reports the results thereof to the member of the Board.

(E) All costs and expenses approved by the President attributable to the employment of any member of the Board shall be payable from the Fund, including fees and mileage expenses for witnesses summoned by such members on the same basis and to the same extent as if such witnesses were summoned before a district court of the United States.

(F) All decisions rendered by members of the Board shall be in writing, with notification to all appropriate parties, and shall be rendered within ninety days of submission of a claim to a member, unless all the parties to the claim agree in writing to an extension or unless the President extends the time limit pursuant to subparagraph (I) of this subsection.

(G) All decisions rendered by members of the Board shall be final, and any party to the proceeding may appeal such a decision within thirty days of notification of the award or decision. Any such appeal shall be made to the Federal district court for the district where the arbitral hearing took place. In any such appeal, the award or decision of the member of the Board shall be considered binding and conclusive, and shall not be overturned except for arbitrary or capricious abuse of the member's discretion: *Provided, however*, That no such award or decision shall be admissible as evidence of any issue of fact or law in any proceeding brought under any other provision of this chapter or under any other provision of law. Nor shall any prearbitral settlement reached pursuant to subsection (b)(2)(A) of this section be admissible as evidence in any such proceeding.

(H) Within twenty days of the expiration of the appeal period for any arbitral award or decision, or within twenty days of the final judicial determination of any appeal taken pursuant

to this subsection, the President shall pay any such award from the Fund. The President shall determine the method, terms, and time of payment.

(I) If at any time the President determines that, because of a large number of claims arising from any incident or set of incidents, it is in the best interests of the parties concerned, he may extend the time for prearbitral negotiation or for rendering an arbitral decision pursuant to this subsection by a period not to exceed sixty days. He may also group such claims for submission to a member of the Board of Arbitrators.

(c) Subrogation rights; actions maintainable

(1) Payment of any claim by the Fund under this section shall be subject to the United States Government acquiring by subrogation the rights of the claimant to recover those costs of removal or damages for which it has compensated the claimant from the person responsible or liable for such release.

(2) Any person, including the Fund, who pays compensation pursuant to this chapter to any claimant for damages or costs resulting from a release of a hazardous substance shall be subrogated to all rights, claims, and causes of action for such damages and costs of removal that the claimant has under this chapter or any other law.

(3) Upon request of the President, the Attorney General shall commence an action on behalf of the Fund to recover any compensation paid by the Fund to any claimant pursuant to this subchapter, and, without regard to any limitation of liability, all interest, administrative and adjudicative costs, and attorney's fees incurred by the Fund by reason of the claim. Such an action may be commenced against any owner, operator, or guarantor, or against any other person who is liable, pursuant to any law, to the compensated claimant or to the Fund, for the damages or costs for which compensation was paid.

(d) Time for presentation of claims or maintenance of actions

No claim may be presented, nor may an action be commenced for damages under this subchapter, unless that claim is presented or action commenced within three years from the date of the discovery of the loss or December 11, 1980, whichever is later: *Provided, however*, That the time limitations contained herein shall not begin to run against a minor until he reaches eighteen years of age or a legal representative is duly appointed for him, nor against an incompetent person until his incompetency ends or a legal representative is duly appointed for him.

(e) Other statutory or common law claims not waived, etc.

Regardless of any State statutory or common law to the contrary, no person who asserts a claim against the Fund pursuant to this subchapter shall be deemed or held to have waived any other claim not covered or assertable against the Fund under this subchapter arising from the same incident, transaction, or set of circumstances, nor to have split a cause of action. Further, no person asserting a claim against the Fund pursuant to this subchapter shall as a result of any determination of a question of fact or law made in connection with that claim be deemed or held to be collaterally estopped from raising such question in connection with any other claim not covered or assertable against the Fund under this subchapter arising from the same incident, transaction, or set of circumstances.

§ 9613. Civil proceedings

(a) Review of regulations in Circuit Court of Appeals of the United States for the District of Columbia

Review of any regulation promulgated under this chapter may be had upon application by any interested person only in the Circuit Court of Appeals of the United States for the District of Columbia. Any such application shall be made within ninety days from the date of promulgation of such regulations. Any matter with respect to which review could have been

obtained under this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement or to obtain damages or recovery of response costs.

(b) Jurisdiction; venue

Except as provided in subsection (a) of this section, the United States district courts shall have exclusive original jurisdiction over all controversies arising under this chapter, without regard to the citizenship of the parties or the amount in controversy. Venue shall lie in any district in which the release or damages occurred, or in which the defendant resides, may be found, or has his principal office. For the purposes of this section, the Fund shall reside in the District of Columbia.

(c) Controversies or other matters resulting from tax collection or tax regulation review

The provisions of subsections (a) and (b) of this section shall not apply to any controversy or other matter resulting from the assessment of collection of any tax, as provided by subchapter II of this chapter, or to the review of any regulation promulgated under Title 26.

(d) Litigation commenced prior to December 11, 1980

No provision of this chapter shall be deemed or held to moot any litigation concerning any release of any hazardous substance, or any damages associated therewith, commenced prior to December 11, 1980.

§ 9614. Relationship to other law

(a) Additional State liability or requirements with respect to release of substances within State

Nothing in this chapter shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State.

(b) Recovery under other State or Federal law of compensation for removal costs or damages, or payment of claims

Any person who receives compensation for removal costs or damages or claims pursuant to this chapter shall be precluded from recovering compensation for the same removal costs or damages or claims pursuant to any other State or Federal law. Any person who receives compensation for removal costs or damages or claims pursuant to any other Federal or State law shall be precluded from receiving compensation for the same removal costs or damages or claims as provided in this chapter.

(c) Contributions to other funds; limitations, etc.

Except as provided in this chapter, no person may be required to contribute to any fund, the purpose of which is to pay compensation for claims for any costs of response or damages or claims which may be compensated under this subchapter. Nothing in this section shall preclude any State from using general revenues for such a fund, or from imposing a tax or fee upon any person or upon any substance in order to finance the purchase or prepositioning of hazardous substance response equipment or other preparations for the response to a release of hazardous substances which affects such State.

(d) Financial responsibility of owner or operator of vessel or facility under State or local law, rule, or regulation

Except as provided in this subchapter, no owner or operator of a vessel or facility who establishes and maintains evidence of financial responsibility in accordance with this subchapter shall be required under any State or local law, rule, or regulation to establish or maintain any other evidence of financial responsibility in connection with liability for the release of a hazardous substance from such vessel or facility. Evidence of compliance with the financial responsibility requirements of this subchapter shall be accepted by a State in lieu of any other requirement of financial responsibility imposed by such State in connection with liability for the release of a hazardous substance from such vessel or facility.

§ 9615. Presidential delegation and assignment of duties or powers and promulgation of regulations

The President is authorized to delegate and assign any duties or powers imposed upon or assigned to him and to promulgate any regulations necessary to carry out the provisions of this subchapter.

SUBCHAPTER II—HAZARDOUS SUBSTANCE RESPONSE REVENUE

PART A—HAZARDOUS SUBSTANCE RESPONSE TRUST FUND

§ 9631. Establishment of Hazardous Substance Response Trust Fund

(a) Creation of Trust Fund

There is established in the Treasury of the United States a trust fund to be known as the "Hazardous Substance Response Trust Fund" (hereinafter in this part referred to as the "Response Trust Fund"), consisting of such amounts as may be appropriated or transferred to such Trust Fund as provided in this section.

(b) Transfers to Response Trust Fund

(1) Amounts equivalent to certain taxes, etc.

There are hereby appropriated, out of any money in the Treasury not otherwise appropriated, to the Response Trust Fund amounts determined by the Secretary of the Treasury (hereinafter in this subtitle referred to as the "Secretary") to be equivalent to—

(A) the amounts received in the Treasury under section 4611 or 4661 of Title 26,

(B) the amounts recovered on behalf of the Response Trust Fund under this chapter,

(C) all moneys recovered or collected under section 1321(b)(6)(B) of Title 33,

(D) penalties assessed under subchapter I of this chapter, and

(E) punitive damages under section 9607(c)(8) of this title.

(2) Authorization for appropriations

There is authorized to be appropriated to the Emergency Response Trust Fund for fiscal year—

(A) 1981, $44,000,000,

(B) 1982, $44,000,000,

(C) 1983, $44,000,000,

(D) 1984, $44,000,000, and

(E) 1985, $44,000,000, plus an amount equal to so much of the aggregate amount authorized to be appropriated under subparagraphs (A), (B), (C), and (D) as has not been appropriated before October 1, 1984.

(3) Transfer of funds

There shall be transferred to the Response Trust Fund—

(A) one-half of the unobligated balance remaining before December 11, 1980, under the Fund in section 1321 of Title 33, and

(B) the amounts appropriated under section 1364(b) of Title 33 during any fiscal year.

(c) Expenditures from Response Trust Fund

(1) In general

Amounts in the Response Trust Fund shall be available in connection with releases or threats of releases of hazardous sub-

stances into the environment only for purposes of making expenditures which are described in section 9611 (other than subsection (j) thereof) of this title, as in effect on December 11, 1980, including—

(A) response costs,

(B) claims asserted and compensable but unsatisfied under section 1321 of Title 33,

(C) claims for injury to, or destruction or loss of, natural resources, and

(D) related costs described in section 9611(c) of this title.

(2) Limitations on expenditures

At least 85 percent of the amounts appropriated to the Response Trust Fund under subsection (b)(1)(A) and (2) of this section shall be reserved—

(A) for the purposes specified in paragraphs (1), (2), and (4) of section 9611(a) of this title, and

(B) for the repayment of advances made under section 9633(c) of this title, other than advances subject to the limitation of section 9633(c)(2)(C) of this title.

§ 9632. Liability of United States limited to amount in Trust Fund

(a) General rule

Any claim filed against the Response Trust Fund may be paid only out of such Trust Fund. Nothing in this chapter (or in any amendment made by this Act) shall authorize the payment by the United States Government of any additional amount with respect to any such claim out of any source other than the Response Trust Fund.

(b) Order in which unpaid claims are to be paid

If at any time the Response Trust Fund is unable (by reason of subsection (a) of this section or the limitation of section 9631(c)(2) of this title) to pay all of the claims payable out of such Trust Fund at such time, such claims shall, to the extent permitted under subsection (a) of this section, be paid in full in the order in which they were finally determined.

§ 9633. Administrative provisions

(a) Method of transfer

The amounts appropriated by section 9631(b)(1) of this title shall be transferred at least monthly from the general fund of the Treasury to the Response Trust Fund on the basis of estimates made by the Secretary of the amounts referred to in such section. Proper adjustments shall be made in the amount subsequently transferred to the extent prior estimates were in excess of or less than the amounts required to be transferred.

(b) Management of Trust Fund

(1) Report

The Secretary shall be the trustee of the Response Trust Fund, and shall report to the Congress for each fiscal year ending on or after September 30, 1981, on the financial condition and the results of the operations of such Trust Fund during such fiscal year and on its expected condition and operations during the next 5 fiscal years. Such report shall be printed as a House document of the session of the Congress to which the report is made.

(2) Investment

It shall be the duty of the Secretary to invest such portion of such Trust Fund as is not, in his judgment, required to meet current withdrawals. Such investments shall be in public debt securities with maturities suitable for the needs of such Trust

Fund and bearing interest at rates determined by the Secretary, taking into consideration current market yields on outstanding marketable obligations of the United States of comparable maturities. The income on such investments shall be credited to and form a part of such Trust Fund.

(c) Authority to borrow

(1) In general

There are authorized to be appropriated to the Response Trust Fund, as repayable advances, such sums as may be necessary to carry out the purposes of such Trust Fund.

(2) Limitations on advances to Response Trust Fund

(A) Aggregate advances

The maximum aggregate amount of repayable advances to the Response Trust Fund which is outstanding at any one time shall not exceed an amount which the Secretary estimates will be equal to the sum of the amounts which will be appropriated or transferred to such Trust Fund under paragraph (l)(A) of section 9631(b) of this title for the following 12 months, and

(B) Advances for payment of response costs

No amount may be advanced after March 31, 1983, to the Response Trust Fund for the purpose of paying response costs described in section 9611(a)(1), (2), or (4) of this title, unless such costs are incurred incident to any spill the effects of which the Secretary determines to be catastrophic.

(C) Advances for other costs

The maximum aggregate amount advanced to the Response Trust Fund which is outstanding at any one time for the purpose of paying costs other than costs described in section 9611(a)(1), (2), or (4) of this title shall not exceed one-third of the amount of the estimate made under subparagraph (A).

(D) Final repayment

No advance shall be made to the Response Trust Fund after September 30, 1985, and all advances to such Fund shall be repaid on or before such date.

(3) Repayment of advances

Advances made pursuant to this subsection shall be repaid, and interest on such advances shall be paid, to the general fund of the Treasury when the Secretary determines that moneys are available for such purposes in the Trust Fund to which the advance was made. Such interest shall be at rates computed in the same manner as provided in subsection (b) of this section and shall be compounded annually.

PART B—POST-CLOSURE LIABILITY TRUST FUND

§ 9641. Post-closure Liability Trust Fund

(a) Creation of Trust Fund

There is established in the Treasury of the United States a trust fund to be known as the "Post-closure Liability Trust Fund", consisting of such amounts as may be appropriated, credited, or transferred to such Trust Fund.

(b) Expenditures from Post-closure Liability Trust Fund

Amounts in the Post-closure Liability Trust Fund shall be available only for the purposes described in sections 9607(k) and 9611(j) of this title (as in effect on December 11, 1980).

(c) Administrative provisions

The provisions of sections 9632 and 9633 of this title shall apply with respect to the Trust Fund established under this section, except that the amount of any repayable advances outstanding at any one time shall not exceed $200,000,000.

SUBCHAPTER III—MISCELLANEOUS PROVISIONS

§ 9651. Reports and studies

(a) Implementation experiences; identification and disposal of waste

(1) The President shall submit to the Congress, within four years after December 11, 1980, a comprehensive report on experience with the implementation of this chapter including, but not limited to—

(A) the extent to which the chapter and Fund are effective in enabling Government to respond to and mitigate the effects of releases of hazardous substances;

(B) a summary of past receipts and disbursements from the Fund;

(C) a projection of any future funding needs remaining after the expiration of authority to collect taxes, and of the threat to public health, welfare, and the environment posed by the projected releases which create any such needs;

(D) the record and experience of the Fund in recovering Fund disbursements from liable parties;

(E) the record of State participation in the system of response, liability, and compensation established by this chapter;

(F) the impact of the taxes imposed by subchapter II of this chapter on the Nation's balance of trade with other countries;

(G) an assessment of the feasibility and desirability of a schedule of taxes which would take into account one or more of the following: the likelihood of a release of a hazardous substance, the degree of hazard and risk of harm to public health, welfare, and the environment resulting from any such release, incentives to proper handling, recycling, incineration, and neutralization of hazardous wastes, and disincentives to improper or illegal handling or disposal of

hazardous materials, administrative and reporting burdens on Government and industry, and the extent to which the tax burden falls on the substances and parties which create the problems addressed by this chapter. In preparing the report, the President shall consult with appropriate Federal, State, and local agencies, affected industries and claimants, and such other interested parties as he may find useful. Based upon the analyses and consultation required by this subsection, the President shall also include in the report any recommendations for legislative changes he may deem necessary for the better effectuation of the purposes of this chapter, including but not limited to recommendations concerning authorization levels, taxes, State participation, liability and liability limits, and financial responsibility provisions for the Response Trust Fund and the Post-closure Liability Trust Fund;

(H) an exemption from or an increase in the substances or the amount of taxes imposed by section 4661 of Title 26 for copper, lead, and zinc oxide, and for feedstocks when used in the manufacture and production of fertilizers, based upon the expenditure experience of the Response Trust Fund;

(I) the economic impact of taxing coal-derived substances and recycled metals.

(2) The Administrator of the Environmental Protection Agency (in consultation with the Secretary of the Treasury) shall submit to the Congress (i) within four years after December 11, 1980, a report identifying additional wastes designated by rule as hazardous after the effective date of this chapter and pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C.A. § 6921] and recommendations on appropriate tax rates for such wastes for the Post-closure Liability Trust Fund. The report shall, in addition, recommend a tax rate, considering the quantity and potential danger to human health and the environment posed by the disposal of any wastes which the Administrator, pursuant to subsection 3001(b)(2)(B) and subsection 3001(b)(3)(A) of the Solid Waste Disposal Act of 1980 [42

U.S.C.A. §§ 6921(b)(2)(B) and 6921(b)(3)(A)], has determined should be subject to regulation under subtitle C of such Act [42 U.S.C.A. § 6921 et seq.], (ii) within three years after December 11, 1980, a report on the necessity for and the adequacy of the revenue raised, in relation to estimated future requirements, of the Post-closure Liability Trust Fund.

(b) Private insurance protection

The President shall conduct a study to determine (1) whether adequate private insurance protection is available on reasonable terms and conditions to the owners and operators of vessels and facilities subject to liability under section 9607 of this title, and (2) whether the market for such insurance is sufficiently competitive to assure purchasers of features such as a reasonable range of deductibles, coinsurance provisions, and exclusions. The President shall submit the results of his study, together with his recommendations, within two years of December 11, 1980 and shall submit an interim report on his study within one year of December 11, 1980.

(c) Regulations respecting assessment of damages to natural resources

(1) The President, acting through Federal officials designated by the National Contingency Plan published under section 9605 of this title, shall study and, not later than two years after December 11, 1980, shall promulgate regulations for the assessment of damages for injury to, destruction of, or loss of natural resources resulting from a release of oil or a hazardous substance for the purposes of this chapter and section 1321(f)(4) and (5) of Title 33.

(2) Such regulations shall specify (A) standard procedures for simplified assessments requiring minimal field observation, including establishing measures of damages based on units of discharge or release or units of affected area, and (B) alternative protocols for conducting assessments in individual cases to determine the type and extent of short-and long-term injury, destruction, or loss. Such regulations shall identify the best available procedures to determine such damages, including

both direct and indirect injury, destruction, or loss and shall take into consideration factors including, but not limited to, replacement value, use value, and ability of the ecosystem or resource to recover.

(3) Such regulations shall be reviewed and revised as appropriate every two years.

(d) Issues, alternatives, and policy considerations involving selection of location for waste treatment, storage, and disposal facilities

The Administrator of the Environmental Protection Agency shall, in consultation with other Federal agencies and appropriate representatives of State and local governments and nongovernmental agencies, conduct a study and report to the Congress within two years of December 11, 1980, on the issues, alternatives, and policy considerations involved in the selection of locations for hazardous waste treatment, storage, and disposal facilities. This study shall include—

(A) an assessment of current and projected treatment, storage, and disposal capacity needs and shortfalls for hazardous waste by management category on a State-by-State basis;

(B) an evaluation of the appropriateness of a regional approach to siting and designing hazardous waste management facilities and the identification of hazardous waste management regions, interstate or intrastate, or both, with similar hazardous waste management needs;

(C) solicitation and analysis of proposals for the construction and operation of hazardous waste management facilities by nongovernmental entities, except that no proposal solicited under terms of this subsection shall be analyzed if it involves cost to the United States Government or fails to comply with the requirements of subtitle C of the Solid Waste Disposal Act [42 U.S.C.A. § 6921 et seq.] and other applicable provisions of law;

(D) recommendations on the appropriate balance between public and private sector involvement in the siting, design, and operation of new hazardous waste management facilities;

(E) documentation of the major reasons for public opposition to new hazardous waste management facilities; and

(F) an evaluation of the various options for overcoming obstacles to siting new facilities, including needed legislation for implementing the most suitable option or options.

(e) Adequacy of existing common law and statutory remedies

(1) In order to determine the adequacy of existing common law and statutory remedies in providing legal redress for harm to man and the environment caused by the release of hazardous substances into the environment, there shall be submitted to the Congress a study within twelve months of December 11, 1980.

(2) This study shall be conducted with the assistance of the American Bar Association, the American Law Institute, the Association of American Trial Lawyers, and the National Association of State Attorneys General with the President of each entity selecting three members from each organization to conduct the study. The study chairman and one reporter shall be elected from among the twelve members of the study group.

(3) As part of their review of the adequacy of existing common law and statutory remedies, the study group shall evaluate the following:

(A) the nature, adequacy, and availability of existing remedies under present law in compensating for harm to man from the release of hazardous substances;

(B) the nature of barriers to recovery (particularly with respect to burdens of going forward and of proof and relevancy) and the role such barriers play in the legal system;

(C) the scope of the evidentiary burdens placed on the plaintiff in proving harm from the release of hazardous substances, particularly in light of the scientific uncertainty over causation with respect to—

(i) carcinogens, mutagens, and teratogens, and

(ii) the human health effects of exposure to low doses of hazardous substances over long periods of time;

(D) the nature and adequacy of existing remedies under present law in providing compensation for damages to natural resources from the release of hazardous substances;

(E) the scope of liability under existing law and the consequences, particularly with respect to obtaining insurance, of any changes in such liability;

(F) barriers to recovery posed by existing statutes of limitations.

(4) The report shall be submitted to the Congress with appropriate recommendations. Such recommendations shall explicitly address—

(A) the need for revisions in existing statutory or common law, and

(B) whether such revisions should take the form of Federal statutes or the development of a model code which is recommended for adoption by the States.

(5) The Fund shall pay administrative expenses incurred for the study. No expenses shall be available to pay compensation, except expenses on a per diem basis for the one reporter, but in no case shall the total expenses of the study exceed $300,000.

(f) Modification of national contingency plan

The President, acting through the Administrator of the Environmental Protection Agency, the Secretary of Transportation, the Administrator of the Occupational Safety and Health Administration, and the Director of the National Institute for Occupational Safety and Health shall study and, not later than two years after December 11, 1980, shall modify the national contingency plan to provide for the protection of the health and safety of employees involved in response actions.

§ 9652. Effective dates; savings provisions

(a) Unless otherwise provided, all provisions of this chapter shall be effective on December 11, 1980.

(b) Any regulation issued pursuant to any provisions of section 1321 of Title 33 which is repealed or superseded by this chapter and which is in effect on the date immediately preceding the effective date of this chapter shall be deemed to be a regulation issued pursuant to the authority of this chapter and shall remain in full force and effect unless or until superseded by new regulations issued thereunder.

(c) Any regulation—

(1) respecting financial responsibility,

(2) issued pursuant to any provision of law repealed or superseded by this chapter, and

(3) in effect on the date immediately preceding the effective date of this chapter shall be deemed to be a regulation issued pursuant to the authority of this chapter and shall remain in full force and effect unless or until superseded by new regulations issued thereunder.

(d) Nothing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants. The provisions of this chapter shall not be considered, interpreted, or construed in any way as reflecting a determination, in part or whole, of policy regarding the inapplicability of strict liability, or strict liability doctrines, to activities relating to hazardous substances, pollutants, or contaminants or other such activities.

§ 9653. Termination of authority to collect taxes

Unless reauthorized by the Congress, the authority to collect taxes conferred by this chapter shall terminate on September 30, 1985, or when the sum of the amounts received in the Treasury under section 4611 and under 4661 of Title 26 total $1,380,000,000, whichever occurs first. The Secretary of the Treasury shall estimate when this level of $1,380,000,000 will be reached and shall by regulation, provide procedures for the termination of the tax authorized by this chapter and imposed under sections 4611 and 4661 of Title 26.

§ 9654. Applicability of Federal water pollution control funding, etc., provisions

(a) One-half of the unobligated balance remaining before December 11, 1980, under subsection (k) of section 1321 of Title 33 and all sums appropriated under section 1364(b) of Title 33 shall be transferred to the Fund established under subchapter II of this chapter.

(b) In any case in which any provision of section 1321 of Title 33 is determined to be in conflict with any provisions of this chapter, the provisions of this chapter shall apply.

§ 9655. Legislative veto of rule or regulation

(a) Transmission to Congress upon promulgation or repromulgation of rule or regulation; disapproval procedures

Notwithstanding any other provision of law, simultaneously with promulgation of repromulgation of any rule or regulation under authority of subchapter I of this chapter, the head of the department, agency, or instrumentality promulgating such rule or regulation shall transmit a copy thereof to the Secretary of the Senate and the Clerk of the House of Representatives. Except as provided in subsection (b) of this section, the rule or regulation shall not become effective, if—

(1) within ninety calendar days of continuous session of Congress after the date of promulgation, both Houses of Congress adopt a concurrent resolution, the matter after the resolving clause of which is as follows: "That Congress disapproves the rule or regulation promulgated by the dealing with the matter of which rule or regulation was transmitted to Congress on .", the blank spaces therein being appropriately filled; or

(2) within sixty calendar days of continuous session of Congress after the date of promulgation, one House of Congress adopts such a concurrent resolution and transmits such resolution to the other House, and such resolution is not disapproved by such other House within thirty calendar days of continuous session of Congress after such transmittal.

(b) Approval; effective dates

If, at the end of sixty calendar days of continuous session of Congress after the date of promulgation of a rule or regulation, no committee of either House of Congress has reported or been discharged from further consideration of a concurrent resolution disapproving the rule or regulation and neither House has adopted such a resolution, the rule or regulation may go into effect immediately. If, within such sixty calendar days, such a committee has reported or been discharged from further consideration of such a resolution, or either House has adopted such a resolution, the rule or regulation may go into effect not sooner than ninety calendar days of continuous session of Congress after such rule is prescribed unless disapproved as provided in subsection (a) of this section.

(c) Sessions of Congress as applicable

For purposes of subsections (a) and (b) of this section—

(1) continuity of session is broken only by an adjournment of Congress sine die; and

(2) the days on which either House is not in session because of an adjourment of more than three days to a day certain are excluded in the computation of thirty, sixty, and ninety calendar days of continuous session of Congress.

(d) Congressional inaction on, or rejection of, resolution of disapproval

Congressional inaction on, or rejection of, a resolution of disapproval shall not be deemed an expression of approval of such rule or regulation.

§ 9656. Transportation of hazardous substances; listing as hazardous material; liability for release

(a) Each hazardous substance which is listed or designated as provided in section 9601(14) of this title shall, within ninety days after December 11, 1980, or at the time of such listing or designation, whichever is later, be listed as a hazardous material under the Hazardous Materials Transportation Act [49 U.S.C.A. § 1801 et seq.].

(b) A common or contract carrier shall be liable under other law in lieu of section 9607 of this title for damages or remedial action resulting from the release of a hazardous substance during the course of transportation which commenced prior to the effective date of the listing of such substance as a hazardous material under the Hazardous Materials Transportation Act [49 U.S.C.A. § 1801 et seq.], or for substances listed pursuant to subsection (a) of this section, prior to the effective date of such listing: *Provided, however*, That this subsection shall not apply where such a carrier can demonstrate that he did not have actual knowledge of the identity or nature of the substance release.

§ 9657. Separability of provisions

If any provisions of this chapter, or the application of any provision of this chapter to any person or circumstance, is held invalid, the application of such provision to other persons or circumstances and the remainder of this chapter shall not be affected thereby.